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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

EASTERN DIVISION,

SEPTEMBER TERM, 1913

MIDDLE DIVISION,

DECEMBER TERM, 1913

WESTERN DIVISION,

APRIL TERM, 1913.

FRANK M. THOMPSON,

ATTORNEY-GENERAL AND REPORTER.

VOL. I.

E. W. STEPHENS PUBLISHING CO.
COLUMBIA, MISSOURI
1914

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

WESTERN DIVISION

JACKSON, APRIL TERM, 1913.

(Continued from Vol. 127.)

NANCE *v.* PIANO CO.*

(Jackson. April Term, 1913.)

1. INNKEEPERS. Lien.

At common law innkeepers had a lien upon baggage brought upon the premises by guests, whether it belonged to the guests or to third persons; but such lien did not exist in favor of boarding house keepers. (*Post*, *p.* 5.)

Cases cited and approved: Hunter v. Sevier, 15 Tenn., 130; Cook v. Kane, 13 Ore., 482; Black v. Brennan, 5 Dana (Ky.), 310; Singer Mfg. Co. v. Miller, 52 Minn., 516; Meacham v. Galloway, 102 Tenn., 415.

***For some decisions on the question of an innkeeper's lien, see note in 21 L. R. A., 229. And upon the question of the lien of an innkeeper on property of third person in possession of guest, see note in 24 L. R. A. (N. S.), 958.**

2. LIVERY STABLE KEEPERS. Lien.

At common law a livery stable keeper did not have a lien such as that given to innkeepers. (*Post*, *p.* 6.)

Code cited and construed: Sec. 3556 (S.).

Cases cited and approved: McGee v. Edwards, 87 Tenn., 506; Caldwell v. Tutt, 78 Tenn., 258.

3. INNKEEPERS. Eminent domain. Liens by boarding house keepers. Validity of statute.

Shannon's Code, sec. 3590, giving the keepers of boarding and lodging houses a lien on all baggage and other goods, brought into such house by any guest, to secure payment of sums due for board or lodging, is valid, and does not violate Const. Tenn., art. 1, sec. 21, prohibiting property from being taken without just compensation. (*Post*, *pp.* 6, 7.)

Cases cited and approved: Waters v. Gerard, 189 N. Y., 302; Arendale v. Morgan & Co., 37 Tenn., 703; Guano Co. v. Hunt, 100 Tenn., 89.

4. CONSTITUTIONAL LAW. Innkeepers. Due process of law.

The statute does not violate Const., art. 1, sec. 8, prohibiting one from being deprived of property, except by the law of the land. (*Post*, *pp.* 6, 7.)

5. SALES. Conditional sales.

A conditional vendor only has a lien as security for the purchase money by the retention of title, and does not own the property absolutely. (*Post*, *p.* 7.)

Constitution cited and construed: Art. 1, sec. 8; art. 11, sec. 8.

Cases cited and approved: Southern Ice & Coal Co. v. Alley, 154 S. W., 536; McGee v. Edwards, 87 Tenn., 506; Motlow v. State, 125 Tenn., 589.

6. CONSTITUTIONAL LAW. "Law of the land." Abolishing common law.

The legislature is not prohibited from changing or abolishing the common law in force at the adoption of the State constitution, in the absence of restriction in the State or Federal Constitution; the phrase "law of the land" as used in the State Constitution, merely referring to the common and statute law

then existing, but not prohibiting the change of the common law. (*Post*, *pp.* 8,9.)

Case cited and approved: Prescott v. Duncan, 148 S. W., 299.

Case cited and distinguished: Harbison v. Knoxville Iron Co., 103 Tenn., 421.

FROM SHELBY.

Appeal from Circuit Court, Shelby County.—H. W. LAUGHLIN, Judge.

D. B. LOOMIS, for appellant.

BROWN & ANDERSON, for appellee.

Mr. Justice LANSDEN delivered the opinion of the Court.

This is an action of replevin, brought by the piano company, as plaintiff below, to recover from Mrs. Nance a certain piano, which it claimed as the conditional vendor of the piano to one Ives.

The piano company sold a piano to Ives in February, 1906, at the price of $385, $10 of which was paid in cash and $43 was paid by the piano company taking another piano in exchange. The balance of $332 and interest was to be paid at the rate of $6 per month, and title to the piano was to remain in the piano company until the whole price was fully paid. The agreement that the title should remain in the piano company was in writing.

Ives died, and on May 18, 1911, his widow and minor children went to the boarding house of Mrs. Nance for

the purpose of boarding and lodging with her. Mrs. Ives took the piano to the boarding house at the time she and her family began boarding with Mrs. Nance. They remained with Mrs. Nance until June 28, 1911, when they left, owing her $78 for board. Mrs. Ives did not take the piano with her when she left the boarding house. Mrs. Nance had no notice or knowledge of the rights of the piano company. Ives paid all of the purchase price of the piano, except $36.71.

Upon these facts, the court of civil appeals held that the lien of Mrs. Nance was superior to that of the piano company. The piano company has filed its petition for *certiorari* to the decree of the court of civil appeals. The court of civil appeals was of opinion that the case was controlled by section 3590 of Shannon's Code as follows:

"Sec. 3590. Keepers of hotels, boarding houses and lodging houses, whether licensed or not, shall have a lien on all furniture, baggage or wearing apparel, or other goods and chattels brought into any such hotel, boarding house or lodging house by any guest or patron of the same, to secure the payment by such guests of all sums due for board or lodging."

The only error assigned in this court is that the foregoing section of the Code is unconstitutional and void, in so far as it attempts to confer a lien in favor of keepers of boarding houses and lodging houses on the personal property brought into them by any guest or patron to secure the payment of sums due for board or lodging. It is not denied that innkeepers would

have such a lien at the common law, but it is said that the legislature has no power to extend the common law lien in favor of innkeepers to personal property in the possession of guests and patrons of boarding houses.

The insistence is that such legislation violates sections 8 and 21 of article 1 of the constitution of this State.

If we understand the contention of counsel upon this point, it is that inasmuch as the extraordinary lien given to innkeepers by the common law, which attached to baggage in the possession of or brought upon their premises by guests, whether it belonged to the guests or to a third party (*Hunter* v. *Sevier*, 7 Yerg., 130; *Cook* v. *Kane*, 13 Or., 482, 11 Pac., 226, 57 Am. Rep., 28; *Black* v. *Brennan*, 5 Dana [Ky.], 310); and such a lien did not exist at common law in favor of boarding house keepers (*Singer Mfg. Co.* v. *Miller*, 52 Minn., 516, 55 N. W., 56, 21 L. R. A., 229, 38 Am. St. Rep., 568), and inasmuch as the common law distinction between innkeepers and boarding house keepers is recognized in this State (*Meacham* v. *Galloway*, 102 Tenn., 415, 52 S. W., 859, 46 L. R. A., 319, 73 Am. St. Rep., 886), therefore it is not competent for the legislature to abolish the distinction taken at the common law and confer the extraordinary lien enjoyed by the innkeeper upon the boarding house keeper.

We will observe, in passing, that this court has in effect decided a similar statute valid, but without discussing its constitutionality. By section 3556 of Shan-

non's Code, livery stable keepers are given the same lien as innkeepers had at common law. The livery stable keeper did not have such a lien at common law. *McGee v. Edwards,* 87 Tenn., 506, 11 S. W., 316, 3 L. R. A., 654. Still this lien was recognized in the case last cited, though postponed to the prior lien of a registered mortgage, and it was expressly enforced in *Caldwell* v. *Tutt,* 10 Lea, 258, 43 Am. Rep., 307, and held to have priority over the levy lien of an execution creditor.

We are of opinion that it is entirely competent for the legislature to confer the lien in question upon boarding house keepers. *Waters* v. *Gerard,* 189 N. Y., 302, 82 N. E., 143, 24 L. R. A. (N. S.), 958, 121 Am. St. Rep., 886, 12 Ann. Cas., 397. Hotels and boarding houses are public necessities, and the legislature may give them such reasonable protection as, in its judgment, a sound public policy may demand. If the legislature believed that keepers of hotels and boarding houses are exposed to fraud and deceit by a fraudulent show of baggage in possession of their guests and patrons, and apparently belonging to them, it is competent for it to provide a lien in their favor for the accommodations received from them upon the strength of credit extended because of property brought upon the premises of the keeper. This is a reasonable exercise of the police power, for the prevention of fraud and deceit, and for the protection of those who, for the convenience of the public, are constantly dealing with transients, and with others, not necessarily transients, but who are often unknown to the boarding house

keeper. It is not a taking of the property of one and bestowing it upon another in any constitutional sense, because it is only just and reasonable for the legislature to require owners of property, who clothe others with its possession and apparent title, to give due and proper notice of the qualified title and possession of those to whom it is intrusted. The justness of this principle is recognized in almost every branch of the law. It finds its illustrations, not only in numerous statutes, both early and late, but in the common law, and in the great body of equity jurisprudence administered by our courts of chancery from the earliest times. The innocent purchaser of bills or notes may acquire a good title as against the true owner, although his vendor procured the instrument by fraud. *Arendale* v. *Morgan & Co.*, 5 Sneed, 703; *Guano Co.* v. *Hunt*, 100 Tenn., 89, 42 S. W., 482. An innocent purchaser of real estate, taking either the real or apparent legal title without notice of the equities of the true owner, will take the property discharged of such secret claim, however meritorious it may be. So it is neither unusual nor unlawful for the statute to require the legal rights of the true owner to be postponed to superior equities arising subsequently in point of time, and through the negligence of the owner.

The piano company, as conditional vendor, does not own the piano absolutely, but acquired a lien merely as security for the purchase money by the retention of the title. *Southern Ice & Coal Co.* v. *Alley*, 154 S. W., 536, 127 Tenn., 173.

The lien conferred by the statute does not exist in favor of the innkeeper and the boarding house keeper, if they have notice of the nature and extent of the title of the patron or guest at the time the property was brought upon the premises, or before credit was extended. *McGee* v. *Edwards*, supra; Jones on Liens, sec. 502. In *Motlow* v. *State*, 125 Tenn., 589, 145 S. W., 188, this court used the following language with respect to the police power:

"The police power is a necessary one, inhering in every sovereignty, for the preservation of the public safety, the public health, and the public morals. It is of vast and undefined extent, expanding and enlarging in the multiplicity of its activities as exigencies demanding its service arise in the development of our complex civilization. It is a function of government solely within the domain of the legislature to declare when this power shall be brought into operation, for the protection or advancement of the public welfare. It is said that the courts have the right to determine whether such law is reasonable. By this expression, however, it is not meant that they have power to pass upon the act with a view to determining whether it was dictated by a wise or a foolish policy, or whether it will ultimately redound to the public good, or whether it is contrary to natural justice and equity. These are considerations solely for the legislature. In determining whether such act is reasonable, the courts decide merely whether it has any real tendency to carry into effect the purposes designed—that is, the protec-

tion of the public safety, the public health, or the public morals—and whether that is really the end had in view, and whether the interests of the public generally, as distinguished from those of a particular class, require such interference, and whether the act in question violates any provision of the State or federal constitution. The constitutional provisions always cited, but not necessarily the only ones, in the courts of this State, with a view to asserting the courts' control over the exercise of the police power by the legislature, are article 1, section 8, and article 11, section 8, of our State constitution, which, as we have already said, are in effect the same, and which provide in substance that no one shall be deprived of his life, liberty, or property, but by due process of law or the law of the land, and no one shall be deprived of the equal protection of the laws. These provisions forbid that any mere individual shall be singled out for legislative action, but do not deny the right to the lawmaking power to make proper classifications for purposes of legislation. Such classification, however, must rest upon some natural or reasonable basis, having some substantial relation to the public welfare, and the same provisions must approximately apply in the same way to all of the members of the class."

In that case it was held that it was competent for the legislature to prohibit entirely the performance of an act which is harmless within itself, if it could be seen that the harmless act was being used as a means of fraud in the promotion of an unlawful act.

The suggestion in briefs that the common law as it existed at the time of the adoption of our constitution was transfixed by that event into a rigid and inflexible system of laws, which could not be changed by the legislature, is one that is not entitled to serious consideration. The only relation which the system of laws in force at the time of the adoption of the constitution has to the construction of that instrument is to furnish a definition and proper interpretation of terms used in the constitution with reference to the system of laws. "The law of the land," as used in the constitution, did not embrace as a fixed and immovable system the common law in existence at the time. It had reference to the common and statute law then existing in this State. But this does not mean that it is not competent for the legislature to alter, change, or abolish the system of law in force at the time of the adoption of the constitution, and it may do so, unless it is prohibited from so doing by the constitution of this State or of the United States, either expressly or by fair and necessary implication. *Prescott* v. *Duncan*, 148 S. W., 229; *Harbison* v. *Knoxville Iron Co.*, 103 Tenn., 421, 53 S. W., 955, 56 L. R. A., 316, 76 Am. St. Rep., 682.

The case last cited is a well-considered one upon this phase of the case, and nothing that we can say can add to the exhaustive discussion of the principles and the copious citation of the authorities to be found there.

The judgment of the court of civil appeals is affirmed.

NOLAN BROS. LUMBER CO. *v.* DUDLEY LUMBER CO.

(*Jackson.* April Term, 1913.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS. Set-off.

The debtor of an insolvent creditor, who has assigned, for the benefit of creditors, the obligation evidencing the indebtedness, may set off against the demand in the hands of the assignee any indebtedness, whether matured or unmatured due from the insolvent. (*Post*, *p.* 15.)

Cases cited and approved: Trust Co. v. Bank, 91 Tenn., 336; Spaulding v. Backus, 122 Mass., 553; Gatewood v. Denton, 40 Tenn., 381; Litterer v. Berry, 72 Tenn., 193; Catron v. Cross, 50 Tenn., 584.

2. PRINCIPAL AND SURETY. Remedies of surety.

A surety or an indorser of a promissory note, who pays the debt due from his principal, may, if the principal be insolvent, enforce an equitable set-off against any demand sued on by such principal. (*Post*, *p.* 16.)

Case cited and approved: Bank v. Kendrick, 92 Tenn., 437.

3. SET-OFF AND COUNTERCLAIM. Right to set-off.

Under Shannon's Code, sec. 4639, providing that a defendant may plead demands matured when offered in set-off, and any equities between defendant and the original party under whom plaintiff claims, which by law have attached to the demand in plaintiff's hands, and for which defendant would be entitled to recover against the original party, the right of an indorser to compensation for the payment of a note of plaintiff's assignor is an equity which may be offered in a set-off in an action by the assignee; the assignor being insolvent. (*Post*, *pp.* 16, 17.)

Cases cited and approved: Taylor v. Deakins, 77 Tenn., 523; Moore v. Weir, 35 Tenn., 46; Bank v. Kendrick, 92 Tenn., 437.

Code cited and construed: Sec. 4639 (S.).

4. SET-OFF AND COUNTERCLAIM. Rights of assignee.

Where defendant was an indorser of a note given by plaintiff's assignor, the assignment of a debt due from defendant to the assignor will not preclude defendant from claiming an equitable set-off; it appearing that the assignor was insolvent at the time of the execution of the note and the making of the assignment, the bare fact that defendant did not pay the note until after the assignment not affecting its rights. (*Post*, *pp.* 18, 19.)

Cases cited and approved: Merwin v. Austin, 58 Conn., 22; Craighead v. Swartz, 219 Pa., 149; Beaver v. Beaver, 23 Pa., 167; Scott v. Timberlake, 83 N. C., 151; Williams v. Helme, v. Dillard, 32 Va., 31; Collins v. Robin, 10 Barns, S. C., 777; 16 N. C., 151; McKnight v. Bradley, 10 Rich. Eq., 557; Feazle Smith v. Felton, 43 N. Y., 419; Coffin v. McLean, 80 N. Y., 560; Scott v. Armstrong, 146 U. S., 499; Armstrong v. Warner, 49 Ohio St., 376; Eigenmann v. Clark, 21 Ind. App., 129; Sewing Machine Co. v. Zachary, 2 Tenn., 478.

Cases cited and disapproved: Huse v. Ames, 104 Mo., 91; Walker v. McKay, 2 Metc., 294; Nettles v. Huggins, 8 Rich., 273; Chance v. Isaacs, 2 Edw. Ch., 348; Richardson v. Anderson, 109 Md., 641.

5. SET-OFF AND COUNTERCLAIM. Assigned rights. Rights of indorser.

Where an indorser of a promissory note paid the same upon the default of the insolvent maker, the mere fact that the note was reassigned to the indorser will not preclude it from claiming to be treated as a surety, and so entitled to set off the note against a claim assigned by the maker to plaintiff. (*Post*, *p.* 20.)

6. SET-OFF AND COUNTERCLAIM. Bills and notes. Indorser. Statutes.

Negotiable Instruments Act (Laws 1899, ch. 94), sec. 50, providing that, where an instrument is negotiated back to a prior party, such party may, subject to the provisions of the act, reissue and further negotiate the same, but he is not entitled to enforce payment against any intervening party, when read

in connection with section 121, providing that, where an instrument is paid by a party secondarily liable, it is not discharged, but the party so paying is remitted to his former rights, will not preclude an indorser of a promissory note, who paid the same upon the insolvency of the maker, from claiming a set-off against one to whom the maker had assigned a debt due from the indorser. (*Post*, p. 21.)

FROM SHELBY.

H. R. BOYD, for complainant.

JACKSON & MCREE, for defendant.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—

Mr. Justice WILLIAMS delivered the opinion of the Court.

This cause is before this court on petition for writ of *certiorari* to the court of civil appeals to review a decree of that court reversing a decree in favor of the Dudley Lumber Company rendered by the chancery court of Shelby county. The case in the chancery court was heard upon an agreed statement of facts.

On March 24, 1910, Nolan Bros. Lumber Company executed its promissory note, payable to the Dudley Lumber Company, to mature May 24th. On April 29, 1910, the Dudley Lumber Company discounted this note with the Michigan Private Exchange Bank, of Grand Rapids, Mich., indorsing the same. On May 10, 1910, the Nolan Company sold to the Dudley Company

a bill of lumber to the amount of $577.24. On May 12, 1910, the Nolan Company, being insolvent at that time (as well as at the date of the execution of the note), assigned this account for lumber to the National City Bank, of Memphis, and that bank on the same day gave due notice of the assignment. This account matured sixty days from the date of its creation. At the maturity of the note, May 24, 1910, the Nolan Company defaulted in payment, and the Dudley Company, under its obligation so to do as indorser, paid and took over the note. On July 10th, the date of the maturity of the account, the Dudley Lumber Company tendered the National City Bank the amount representing the difference between the account and the note, under a claim of a right to set-off as indorser thus forced to liquidate the note demand of the insolvent Nolan Company. The tender was declined by the bank, which brought suit in the name of the assignor on the assigned account.

The Dudley Company here assigns as error in the decree of the court of civil appeals the holding that it was not entitled to set off the note of the Nolan Company, so held by it, against the account.

It is contended that the insolvency of the Nolan Company, at the date of the assignment, makes a case for the application of the doctrine of equitable set-off, and that the Dudley Company, under the obligation of indorser at assignment date, was, prior to the account's maturity, compelled to pay the note, and is entitled to invoke that defense.

The debtor of an insolvent creditor, who has assigned for the benefit of creditors the obligation evidencing the indebtedness, may set off against the demand in the hands of the assignee any indebtedness, whether matured or unmatured, at the date of assignment. *Trust Co.* v. *Bank,* 91 Tenn., 336, 18 S. W., 822, 15 L. R. A., 710.

This right is based on the equity growing out of the insolvency of the assignor, at the time of the assignment; but the opinion in *Trust Company* v. *Bank* indicates a distinction between the assignment where it is to a third party on purchase, as here, and where the assignment is one for the benefit of creditors. The court, in discussing the case of *Spaulding* v. *Backus,* 122 Mass., 553, 23 Am. Rep., 391, said that its "holding is not necessarily inconsistent with the right of set-off as between the original parties, and appears entirely consistent with the decisions of this court that a right of set-off, to be so attached to the debt as to be available against it in the hands of an assignee for value, must be complete and perfect at the date of the assignment. *Gatewood* v. *Denton,* 3 Head, 381; *Litterer* v. *Berry,* 4 Lea, 193; *Catron* v. *Cross,* 3 Heisk., 584." And later in the opinion the court proceeded to treat the case before it as if only the insolvent himself were resisting the set-off, as distinguished from one who took, for value, the assignment.

We deem, therefore, the question for solution in the case at bar to be one not passed upon by the court in

that cited case, nor in any subsequent case decided by this court.

There can be no doubt that a surety or indorser, who pays his principal's demand, has *status*, as such, to enforce an equitable set-off against a demand sued by such principal himself, if that principal be insolvent. There is nothing in any contingent feature incident to the claim of a surety or indorser that defeats the right. *Bank* v. *Kendrick*, 92 Tenn., 437, 21 S. W., 1070, 36 Am. St. Rep., 96, and authorities below cited.

What change is wrought by an assignment, for value, of the demand, followed by notice by the assignee? It was said in *Taylor* v. *Deakins*, 9 Lea, 523: "It is true, the general rule is that the assignee of negotiable paper for a pre-existing debt is not a holder in due course of trade without notice, and hence with respect to *existing equities* he stands in the shoes of the assignor; but the assignee does not continue to stand simply in the shoes of the assignor, especially after notice, so that his right to enforce the payment of the debt may be defeated by subsequent acts of the assignor or debtor."

In *Moore* v. *Weir*, 3 Sneed, 46, it was held that such an assignee's condition, as respects the maker of the demand assigned, is no better than that of the assignor, and a mutual debt existing at the date of the assignment, but maturing afterwards, is allowable as a set-off. And this in an action at law.

By the Code (Shannon, sec. 4639) it is provided that the defendant may plead demands matured when offered in set-off, and any equities between defendant

and the original party (assignor) under whom plaintiff claims, which by law have attached to the demand in plaintiff's hands, and for which the defendant would be entitled to recover against such original party.

The indorser company in the case at bar was such before and at the time the account against it was assigned, and before suit was brought, and, when "offered in set-off," it had taken over the note. The assignor was insolvent at the time the note was executed and indorsed, as well as at the date of the assignment.

In this attitude the indorser had equities between itself and the insolvent assignor attached to the demand, afterwards assigned, so far forth that it could have enforced the retention for its indemnity of any funds belonging to the assignor, principal on the indorsed note, that might be in the indorser's hands; and this without having paid the note. *Bank* v. *Kendrick*, supra; 27 Am. & Eng. Ency. Law (2 Ed.), 478.

We hold that the assignment did not operate to defeat the right of the indorser to stand and prevail upon its defense of equitable set-off. We have not here an effort to set off a demand purchased or acquired after the assignment, but the enforcement of a right that antedated the assignment.

The decisions as to when a surety or indorser has a claim which can be used as a set-off are conflicting. In Connecticut it has been held that a surety may set off the amount which he is compelled to pay for his principal after an assignment against debts which he owed

the insolvent, and which had passed into the hands of an assignee, the court saying that in equity, in view of the insolvency of the principal, the surety could proceed to compel prompt payment, and that, when the surety did later move to that end, the motion related back to the first moment of the existence of the right, which was prior to the acquisition of any right by the assignee. *Merwin* v. *Austin,* 58 Conn., 22, 18 Atl., 1029, 7 L. R. A. 84.

A number of cases may be found to the effect that a surety or indorser, who has not, at the time of the assignment, paid the note, has no right to set off its amount against a debt due by him to the assignor. *Huse* v. *Ames,* 104 Mo., 91, 15 S. W., 965; *Walker* v. *McKay,* 2 Metc. (Ky.), 294; *Nettles* v. *Huggins,* 8 Rich. (S. C.), 273; *Chance* v. *Isaacs,* 2 Edw. Ch. (N. Y.), 348; also see *Richardson* v. *Anderson,* 109 Md., 641, 72 Atl., 485, 25 L. R. A. (N. S.), 394, 130 Am. St. Rep., 543.

But the contrary is held elsewhere. *Craighead* v. *Swartz,* 219 Pa., 149, 67 Atl., 1003; *Beaver* v. *Beaver,* 23 Pa., 167; *Scott* v. *Timberlake,* 83 N. C., 382; *Williams* v. *Helme,* 16 N. C., 151, 18 Am. Dec., 580; *Mc-Knight* v. *Bradley,* 10 Rich. Eq. (S. C.), 557; *Feazle* v. *Dillard,* 32 Va., 31; *Collins* v. *Robine,* 10 Barns. & C., 777. Also see *Smith* v. *Felton,* 43 N. Y., 419; *Coffin* v. *McLean,* 80 N. Y., 560; *Scott* v. *Armstrong,* 146 U. S., 499, 13 Sup. Ct., 148, 36 L. Ed., 1059; *Armstrong* v. *Warner,* 49 Ohio St., 376, 31 N. E., 877, 17 L. R. A., 466; *Eigenmann* v. *Clark,* 21 Ind. App., 129, 51 N. E., 725; 34 Cyc., 751.

We are of opinion that the latter rather than the former line of authorities is more in accord with the principle that underlies our statute and decisions. The element of the time of payment does not figure, if made before the set-off was pleaded; and, as we have seen, in contemplation of equity, rights will be taken to have inhered in the indorser anterior to the assignment. The assignee will not be treated as a *quasi* holder in due course for value as against such an indorser. Manifestly a court of equity should not hold itself powerless to relieve from loss, in a very real sense fixed on the indorser at the time of the assignment, merely because his demand was not matured in law on assignment date. The trend of the more recent cases appears to be towards the ruling here made, and away from the influence of the rules of the common law as to set-off, sometimes harsh in their exactness.

Chancellor Cooper in *Sewing Machine Co.* v. *Zachary*, 2 Tenn. Ch., 478, dealing with a demand assigned for value, cited with approval *Smith* v. *Felton*, supra; and in the latter case the court said: "Equity will look through the form of the transaction, and adjust the equities of the parties with a view to its substance, rather than its form, so long as no superior equities of third persons will be affected by such adjustment. . . . It is enough that justice and equity demand that the debts should be set off against each other, rather than that the defendants should pay the note, and be left to rely upon the estate of an insolvent debtor for the payment of the debt due them. Techni-

cal objections, which would be valid at law, will not avail to defeat equitable set-off. The plaintiffs took title to the note, subject to the equitable claim of the defendants, as it existed at the time of the assignment, which was to set off their debt against the note to the amount of the latter, and the legal title will not avail to defeat this prior equity of the defendants."

The indorser company, in such situation as is here disclosed, is in the eye of equity potentially a creditor, and the assignee succeeded only to the rights of the assignor, subject to the prior equity.

The court of civil appeals held that the Dudley Company was not entitled to be treated as a surety, and that, because it came into possession of the note from the Michigan Bank, subsequent to the assignment of the account, "by reassignment, this amounted to a repurchase or new acquisition by it." This is an erroneous view, even if there had been a formal reindorsement by the Michigan Bank to the Dudley Company, since such reassignment would have been nothing further than an evidencing in form that was true in substance—that the Dudley Company by payment was in command of the obligation that had been indorsed by it. But the only indorsement in fact made by the Michigan Bank was one to a Memphis bank for collection, and payment was made thereunder at the Memphis bank.

As a further ground of its decision adverse to the Dudley Company, the court of civil appeals states its opinion to be "that section 50 of the Negotiable Instru-

ments Act [Laws 1899, ch. 94.] clearly indicates that the indorsee [Dudley Company, treated as such, as above] cannot urge as against an assignee the equities or rights attaching to a note between the date of its execution and its reacquisition by him."

The section referred to is as follows: "Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable." This section should be read in connection with section 121, which provides: "Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own, and all subsequent indorsements, and again negotiate the instrument," etc.

It is clear that there is nothing in the act that bars the indorser company, which paid the note, of its remedy against the maker; and the assignee of the account was not an "intervening party" within the meaning of section 50 of the act. In short, the provisions of the act have no pertinency to the facts of this case.

The writ of *certiorari* is granted, and the decree of the court of civil appeals reversed. Decree here in accord with the one pronounced by the chancellor.

SOLVENT SAVINGS BANK & TRUST CO. *v.* WALKER *et al.*

(*Jackson.* April Term, 1913.)

1. **COURTS. Appellate jurisdiction. Transfers. Statutory provisions.**

Acts 1909, ch. 192, providing that, when cases are appealed to the supreme court which rightly belong to the court of civil appeals, the supreme court shall transfer the case to the court of civil appeals, and *vice versa*, enacted to abolish the practice under which the courts dismissed for want of jurisdiction cases brought to the wrong court, covers all cases brought to either of the courts, whether by appeal or error; and where a case is brought to the supreme court by writ of error, which rightly belongs to the court of civil appeals, the supreme court will transfer the case to the court of civil appeals. (*Post*, *p.* 23.)

2. **STATUTES. Construction. Legislative intent.**

The court, construing a statute, will seek to ascertain the legislative intent, by considering the words used and the meaning which the legislature attached to them, where they are capable of being used in more than one sense, and the context, when taken in connection with the nature of the subject, may require that the ordinary meaning of the words used be restricted or enlarged to effectuate the legislative intent. (*Post*, *pp.* 25, 26.)

Case cited and approved; Standard Oil Co. v. State, 117 Tenn., 618, 638-641.

FROM SHELBY.

Error to Chancery Court, Shelby County.—FRANCIS FENTRESS, Chancellor.

J. T. SETTLE and D. M. SCALES, for complainant.

PAUL W. EVANS and L. H. ESTES, for defendants.

Mr. Chief Justice NEIL delivered the opinion of the Court.

The case before us was brought to this court for review, whereas, under Acts of 1907, ch. 82, it should have been carried to the court of civil appeals. By chapter 192 Acts of 1909, it is provided that, when cases are appealed to this court which rightly belong to the court of civil appeals, it shall be our duty to transfer such cases to that court, and vice versa. But the present case was brought here by writ of error. In view of this fact it is now denied by counsel for defendant that we can make the transfer required by the act of 1909, because, as insisted, that act applies only to appeals. Hence it is said that, having no jurisdiction, we should simply dismiss the case.

Prior to the passage of the act of 1909, the practice was, where a case was brought to the supreme court which should have been appealed to the court of civil appeals, the former court simply dismissed it for want of jurisdiction. The court of civil appeals acted in the same manner in disposing of cases improperly appealed to that court. The result was that in each case of the kind it was necessary that the losing party should begin afresh with his appellate proceedings. But it was then always too late to proceed by simple appeal, and the only recourse left was a petition for writ of error, addressed to the proper court, which

always entailed additional labor on the part of counsel, and delay and expense to the client. To remedy this evil the act of 1909 was passed, providing as follows:

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that from and after the passage of this act all appeals taken from either the chancery, circuit, or county courts of this State to the supreme court or to the court of civil appeals, and in all cases where such appeals are now pending and undetermined in either of said courts, if the court to which any case is appealed shall be of opinion that the jurisdiction to try and determine same is not in said court and is in the other appellate court, it shall be the duty of said court, if it be the court of civil appeals, to transfer said cause to the supreme court for trial, and said supreme court shall cause any such case so transferred to it to be entered upon its trial docket and try and dispose of same as though the appeal had been direct to the supreme court; and likewise, if the supreme court shall be of opinion that the jurisdiction to try and determine any such case which has been appealed to that court is with the court of civil appeals, it is made the duty of said court to transfer any such cause to the said court of civil appeals for trial by the court, which court shall cause any such case to be entered upon its docket and try and dispose of the same in the same manner as though it had been appealed direct to that court, and no writ of error or other process shall be necessary to give the court to which

any such cause has been transferred jurisdiction of either the parties or the subject-matter of litigation.

"Section 2. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it."

While this act, in terms, mentions only appeals, yet its purpose was to do away with the former practice of dismissals for want of jurisdiction as between the two courts, and the delay and cost to the parties caused thereby; the transfer being instant and without expense. In view of this broad purpose, and the evil to be corrected, we think the words "all appeals taken . . . to the supreme court or the court of civil appeals," should be construed to cover all cases brought by appellate proceedings, or proceedings for the correction of errors, to either of the courts named. The legislature had no intention of making any distinction between the different methods by which cases should reach either of the courts. There could be no reason for such distinction.

In arriving at the construction above indicated, it is true we have given the words of the act a more extended meaning than the literal terms imply; but this is permissible in construing statutes, where such a course is necessary to effect the true intention, as that intention is indicated by the general purpose disclosed throughout the act, and by a consideration of the mischief to be remedied thereby. The discovery of the legislative intent is the end to be attained. To reach this all legitimate aids are brought into requisition.

Among these, necessarily, the words used; but the inquiry always involves the meaning which the legislature attached to the words, the sense in which they were used, where they were capable of being used in more than one sense. The ordinary import is, generally, the true import; but the context, when taken in connection with the nature of the subject, the general purpose, and the particular evil to be removed, may require that the ordinary or more obvious meaning be either restricted or enlarged, in order to make possible the effectuation of the real legislative will. *Standard Oil Co.* v. *State*, 117 Tenn., 618, 638-641, 100 S. W., 705, 10 L. R. A. (N. S.), 1015. The letter is but the husk; the substance lies within.

The motion to dismiss must be overruled, and an order entered to transfer the cause to the court of civil appeals.

TURNER *v.* STATE.

(*Jackson.* April Term, 1913.)

JURY. Competency. Opinion concerning the law. "Good and lawful man."

In a prosecution for the sale of intoxicating liquor outside a city within four miles of a school, a venireman who stated that he was in favor of enforcing the law outside of the city, but though saloons should be permitted to run in the city, was not qualified as a "good and lawful man" to sit upon the jury, within the meaning of the law governing the selection of juries, as found in Shannon's Code, secs. 5801, 5804, 5810, 5818, since he believes in partiality in the enforcement of the laws. (*Post*, *p.* 34.)

Cases cited and approved: Fletcher v. State, 25 Tenn., 249; Ray v. State, 108 Tenn., 282.

FROM SHELBY.

Appeal from Criminal Court, Shelby County.—JESSE EDGINTON, Judge.

ALBERT BENHAM, for appellant.

WALTER W. FAW, Assistant Attorney-General, for the State.

Mr. Chief Justice NEIL delivered the opinion of the Court.

The plaintiff in error was indicted, tried, and convicted in the criminal court of Shelby county on a charge of selling intoxicating liquors as a beverage

within four miles of a schoolhouse, where school was kept, contrary to the statute in such cases made and provided, and has appealed to this court and assigned numerous errors, only one of which, however, we need notice.

The bill of exceptions recites that, after plaintiff in error's peremptory challenges had been exhausted, one Sullivan was examined on his *voir dire*, and testified, when examined by the attorney for the State, that he would give the defendant, now plaintiff in error, a fair and impartial trial. He was then turned over to the attorney for the defense. The bill of exceptions proceeds: "The attorney for the defendant, among other things, asked the venireman if he was in favor of enforcing the four-mile law, whereupon the venireman said that he did not know whether he was in favor of enforcing it or not. The defendant's attorney further asked him if he was in favor of letting the saloons run in town, and punishing those out of town. The venireman said that he did not think they ought to have any prohibition law in Memphis. Whereupon the defendant's counsel asked him if he was in favor of enforcing the prohibition law outside of Memphis, in the suburbs, and the venireman said he was. Whereupon the defendant's counsel said: 'You are in favor of the law applying outside of Memphis, but not applying in Memphis?' And the venireman said he thought saloons should be permitted to run in Memphis. Whereupon defendant's counsel excepted, and objected to placing the said venireman on the jury, because said venire-

man was in favor of the law applying outside of the city limits, but not inside the city limits of Memphis. The court then further interrogated the venireman, and asked him if he would bring in a verdict according to the law and the evidence, and if he could give the defendant a fair and impartial trial.'' To the last interrogatory Sullivan made no response. Plaintiff in error, through his attorney, objected to the juror; but his objection was overruled by the court, and the juror was permitted to take his seat in the box. Plaintiff in error reserved an exception, and has assigned error thereon in this court.

It is conceded on the record that Turner's place lies within Shelby county, but outside of the limits of the city of Memphis; and the matter was so treated in the oral argument at the bar by the respective counsel.

The question to be determined is whether the juror was competent. This must be settled in accordance with the following principles:

Our forms of impanelment, both of grand and petit jurors, recite that the jurors are ''good and lawful men.'' This is no unmeaning phrase. It comes down to us from remote times, as far back as the statute of 3 Hen. VIII, ch. 12. That statute in terms applied to grand juries, but was also construed to cover the case of trial juries as well. 2 Halst. Hist. P. C., 156, 265; 5 Bac. Abridg., 313. It has also been recognized and repeated in our statutes and decisions. Shan. Code, sec. 5804; *Neely* v. *State,* 4 Baxt., 180; *Knights of Pythias* v. *Steele,* 107 Tenn. (23 Pick.), 1 and 14, 63 S. W., 1126;

Gribble v. *Wilson*, 101 Tenn., 612, 49 S. W., 736. At the common law the phrase was "*liberi et legales homines.*" The word "*liberi*" in strictness imported freeholders; but it was said: "*Liber homo* is not only one who hath freehold land, but that hath freedom of mind, and stands indifferent, no more inclining to the one than the other." 5 Bac. Abridg., 348. Again: "According to the rule expressed in the English of those days: 'He ne es othes worthe that es enes gylty of oth broken.' Bracton, lib. iv, tr. l. ch. 19." The same thought is expressed in our statutes, in the description of jurors, as men "esteemed in the community for their integrity, fair character, and sound judgment." Shan. Code, sec. 5801. Such only are to be appointed for service in court, and so great is the solicitude which the law feels on this subject that it is further provided that in case the authority vested with the power of appointment shall fail to make the appointment, or those nominated fail to attend, "the court shall designate *other good and lawful men*, and direct the sheriff to summon them as jurors" (section 5804), and that the sheriff in summoning such jurors shall be guided by the same principles (section 5810); and to make even more fully secure the high character of the jury, when finally constituted as a tribunal for the trial of rights, it is provided that the judge presiding may discharge from service any juror who does not possess the requisite qualifications, and may discharge him "for any other reasonable or proper

cause'' (section 5818). The juror should be as impartial as the judge himself.

These are the requirements of the common law, as well as of our modern statutes and decisions, and by our constitution the duty is imposed on this court, and upon all of the judges of the State, to see to it that trial by jury shall remain inviolate (Const., art. 1, sec. 6), and that men shall be tried by impartial juries (Id., art. 1, sec. 9). It has been often held that the constitution means that the right of trial by jury shall be maintained in its integrity and purity as at common law. We have seen what the common law requires; also that our statutes and decisions require the same.

Now is a man who made on his *voir dire* answers such as Sullivan made a "good and lawful man," an impartial man, and a good citizen? We say, "No." He believes, according to his replies, that as to the special crime charged in the indictment the law should be enforced in Shelby county outside of Memphis, but not in Memphis, which is saying, in other words, that he believes in an unequal and partial enforcement of the law, favoring one portion of the people of his county, and discriminating against another portion. Such a man has not the qualification of impartiality which the common law and our statutes demand, and is not competent to sit on a case involving the crime as to which he confesses such principles of conduct.

The subject is illustrated by two concrete cases as follows:

In *Fletcher* v. *State*, 6 Humph., 249, it appeared that the plaintiff in error had been indicted in the circuit court of Jackson county, and convicted, on a charge of passing counterfeited coin, and had appealed to this court. "It is objected to the proceedings in the circuit court," said Mr. Justice Reese, "that the judge presiding at the trial, permitted the attorney-general to inquire of persons returned to serve upon the jury, when examined before the court touching their legal competency, whether they had ever taken a voluntary oath to favor counterfeiters, if at any time they might happen to be placed on the jury in the trial of persons charged with that offense. It is argued that such an inquiry is not so much calculated to prejudice the minds of those interrogated against the party interrogating, in this instance the State, as to place the jury selected in an attitude to fear the pressure of public sentiment against them, in the event they should acquit the prisoner. The interrogatory certainly is unusual and extraordinary, and one which the persons interrogated might well decline to answer. But the condition of the community, at some period and in some places, may be so peculiar that it might be dangerous to limit to a prescribed formula the interrogatories to be propounded on either side, in this preliminary trial, as to the competence of jurors. The combination might be the opposite of that imputed in this instance, and it might be important to a person to inquire into pledges and obligations of a contrary character. It will always be the business and duty of the presiding judge to re-

strain, and of that responsible officer of the government, the attorney-general, to abstain from, a course of interrogation on such occasions useless and wanton. We feel bound to presume that they did so on the present occasion, and that the course adopted was not uncalled for and was taken for the fair and honest purpose of getting a jury *omni exceptione majores.*''

In *Ray* v. *State,* 108 Tenn., 282, 67 S. W., 553, a capital case, it was held that it was proper for the attorney-general to ask one offered as a juror: ''Have you any conscientious or religious scruples against capital punishment? Have you any religious or conscientious scruples against hanging a man for murder in the first degree, when the proof shows him guilty?'' The opinion of the court, delivered by Mr. Justice McAlister, proceeds:

''One juror replied that he had such scruples, and when he said, 'I don't believe in hanging,' the attorney-general asked him, 'But if the law inflicts that penalty as punishment for such offense, do you believe in it, or is the law wrong?' The juror answered: 'The law is wrong; I don't believe in hanging.'

''The attorney-general offered to challenge the juror for this cause, which challenge was overruled by the court, and thereupon the attorney-general challenged the juror peremptorily. It is insisted that this practice on the part of the court was erroneous and highly prejudicial to the rights of the defendant, since three jurors had already been selected and were then in the box, and were necessarily prejudiced by the assump-

tion on the part of the attorney-general that the defendant was guilty.

"We think there was no error in this action of the court. It has frequently occurred in *nisi prius* trials that jurors otherwise competent have been unwilling to execute the law, upon a finding of murder in the first degree, on account of conscientious or religious scruples against capital punishment. Mistrials have frequently resulted on this account, thus entailing unnecessary cost and consumption of the public time. The examination of the juror on his *voir dire* would discover this objection and obviate an expensive and fruitless trial."

In the first of these cases no one can doubt that an affirmative answer by a proposed juror to the inquiry propounded would have discovered his incompetency to sit in the trial of the case. So in the second instance the answer of the venireman disclosed his incompetency to sit as a juror on the trial of a capital case. In neither instance could the juror be considered impartial, or a "lawful," or law-abiding, man.

So, in the present instance, we think, on the grounds we have stated, that the venireman Sullivan was not competent to sit as a juror in a case of the kind we have before us. The judgment will therefore be reversed, and a new trial awarded.

WOOLWINE *v.* MASON *et al.**

(*Jackson.* April Term, 1913.)

1. **INSURANCE. Fire Insurance. Contracts by foreign insurance companies. Validity.**

Under Shannon's Code, secs. 3274-3369, making it unlawful for any insurance company to make a contract of insurance, except as authorized by law, and prescribing the terms on which foreign insurance companies may be authorized to do business in the state, and making any person soliciting insurance on behalf of a foreign insurance company not complying with the law guilty of a misdemeanor, and authorizing licensed insurance brokers to place insurance with foreign companies, a contract of insurance made by a foreign insurance company not authorized to do business in the state, through an agent not an insurance broker, is unlawful. (*Post*, *pp.* 39-41.)

Code construed: Secs. 3275, 3292, 3314, 3315, 3325-3341 (S.).

2. **INSURANCE. Fire Insurance. Unlawful contracts. Liability of agent.**

Under Shannon's Code, sec. 3316, making an agent personally liable on all contracts of insurance unlawfully made by him in behalf of any insurance company not authorized to do business in the State, an agent not a licensed insurance broker, who procures through another agent in a sister State insurance contracts from foreign insurance companies not authorized to do business in the State, is liable to the amount of the policies so obtained, though insured knew of the violation of the law. (*Post*, *pp.* 42, 43.)

Cases cited and approved: Burgess v. Jackson, 18 App. Div., 296; Latham v. Harrod, 71 Kan., 565; Hartman v. Hollowell, 126

***As to the effect of insurance where the statutes regulating the business of foreign insurance companies have not been complied with, see note in 20 L. R. A., 405. And for the question of restrictions on business of foreign insurance companies, see note in 24 L. R. A., 298.**

Iowa, 643; Noble v. Mitchell, 100 Ala., 530; Price v. Garven, 69 S. W., 986.

Code construed: Secs. 3316, 3314, 3315.

FROM SHELBY.

Appeal from Chancery Court, Shelby County.—FRANCIS FENTRESS, Chancellor.

G. J. MCSPADDEN, for appellant.

HENRY CRAFT, for appellees.

Mr. Justice GREEN delivered the opinion of the Court.

The property of complainant was destroyed by fire on February 8, 1911. He had $12,500 of insurance thereon. Of this amount $5,000 was paid to him. He brought this suit against the defendants, an insurance firm in Memphis with whom he had placed his insurance, to recover $11,500. Complainant alleged in his bill that by contract with him said firm had undertaken to keep his property insured for $16,500, and had in fact only insured it for $12,500. He therefore sued for $4,000 for breach of this alleged contract, and for $7,500 of insurance actually written for him by defendants, but not paid to him for certain reasons that will hereafter appear.

The defendants answered complainant's bill, denying all its material averments, and upon the hearing

said bill was dismissed by the chancellor, and from this decree complainant has appealed.

From the proof in this case, which we have orally discussed, we find that complainant has failed to establish the existence of any contract between him and defendants, whereby the latter undertook to keep his property insured for any specified amount.

The decree of the chancellor was therefore correct in so far as it exonerated defendants from liability for the difference between the amount of insurance written on the property and the amount which it was alleged they had contracted to procure.

The disposition of the other questions arising in the case renders it necessary to make a somewhat more detailed statement of the facts.

The complainant, Woolwine, owned and operated a paper box factory in the city of Memphis of the value of about $30,000, including plant and stock. It appears that concerns of this character are regarded as undesirable risks by insurance companies, owing to the inflammable nature of the material necessary to the conduct of such business.

It is obvious from the proof that the complainant had much difficulty in keeping these premises insured to the extent that he desired. One insurance agent with whom he had formerly done business had declined to further handle complainant's insurance. About four years before the destruction of this property, complainant, Woolwine, began doing business with defendants.

We think the weight of the proof is to the effect that Woolwine was advised at the beginning of his relations with defendants, and throughout the existence of those relations, that it was impossible for defendants to place this insurance for him with companies admitted to do business in the State of Tennessee.

The defendants represented three fire insurance companies duly admitted to this State. They were able to place about $3,000 of insurance for complainant in these companies, but policies for the remainder were obtained from companies that had not complied with our laws.

The defendants had some connection or acquaintance with a firm of insurance agents or brokers in Chicago, Shipman & Wayne, and through this Chicago firm they secured policies from various English and American companies on complainant's property.

The negotiations with the Chicago brokers were conducted by defendants. The policies of insurance were sent to defendants, delivered by them to complainant, and the premiums collected by defendants. Of these premiums, defendants retained one-third of the agent's commissions for their compensation.

When the fire occurred, proofs of the loss were prepared by complainant with the assistance of defendants, and these proofs were forwarded through defendants to the Chicago brokers and the several companies.

Some of these foreign companies paid, but several of them, with policies aggregating $7,500, refused to pay, for the reason, as alleged by them, that complain-

ant had failed to comply with a certain promissory warranty contained in the various policies.

It is insisted by complainant that the defendants are personally liable to him for the amount of these unpaid policies, under the provisions of chapter 160 of the Acts of 1895, which we will now consider.

The Act in question, known as the "Tennessee Insurance Act," was passed to regulate the business of insurance other than life and casualty insurance upon the assessment plan, and is carried into Shannon's Code at sections 3274-3369.

Referring to the act by sections as it appears in Shannon's Code, section 3275, after defining a contract of insurance, enacts that "it shall be unlawful for any company to make any contract of insurance upon or concerning any property or interests or lives in this State, or with any resident thereof, or for any person, as insurance agent or insurance broker, to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this article."

Section 3292 prescribes the terms upon which insurance companies organized under the laws of any other State or government shall be admitted and authorized to do business or write contracts of insurance in this State.

It is conceded, as stated above, that none of the companies writing the $7,500 of insurance in controversy have complied with the provisions of section 3292.

Sections 3314 and 3315 are as follows:

"Any person who solicits insurance on behalf of any insurance company not organized under or incorporated by the laws of this State until such company has fully complied with all the requirements of this article, and until such company has received from the insurance commissioner the certificate of authority to transact the business of insurance in this State, or who takes or transmits, other than for himself, any application for insurance, or any policy for insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect a risk, or receive, collect, or transmit any premium or insurance, or make or form any diagram of any building or buildings, or do or perform any other act or thing in the making with or for any insurances, or consummating of any contract of insurance companies, other than for himself, or who shall examine into or adjust, or aid in adjusting, any loss for or on behalf of any such insurance company, whether any such acts shall be done at the request or instance or by the employment of such insurance company, or of or by any broker or other person, shall be held guilty of a misdemeanor, and, upon conviction by a court having jurisdiction, shall be fined not less than one hundred dollars nor more than two hundred dollars, or shall be imprisoned in the county jail not more than thirty days, or both, in the discretion of the court; but nothing contained in this section shall be applicable to parties

placing insurance in accordance with the provisions of this article authorizing insurance brokers to place insurance in foreign companies."

Section 3315:

"It shall not be lawful for any person or persons to act as agent or solicit risks, or in any way, directly or indirectly, to transact the business of insurance for and in behalf of any company, whether organized under and incorporated by the laws of this State or not, without obtaining a certificate of authority from the insurance commissioner of the State so to do, which certificate shall state that said company has fully complied with all the requirements of this article applicable to such company. Whoever shall, directly or indirectly, aid in transacting insurance business in any such company without first receiving such certificate of authority, or, having received such certificate of authority, shall, after receiving from such insurance commissioner notice of the revocation thereof, continue to act as an agent for any such company, shall be deemed to be guilty of a misdemeanor, and, upon conviction by a court having jurisdiction, shall be fined not less than fifty dollars nor more than one hundred dollars; but nothing herein contained shall apply to insurance brokers doing business in this State for foreign insurance companies, as provided in this article."

It is obvious that the contracts of insurance procured from the foreign companies through the agency of defendants and the Chicago brokers were unlawfully made by defendants under the provisions of this act.

Sections 3325-3341 prescribe the only method in which contracts of insurance can be made by or through agents for noncomplying companies upon property located in this State. These sections provide for insurance brokers proper, duly licensed under various restrictions, placing insurance with foreign companies. Policies so obtained are required to be stamped "This company has no deposits and no agents in Tennessee," and many other things are required of brokers undertaking to do this sort of business. It is not contended that the defendants were insurance brokers proper, or had complied with the provisions of the act of 1895 as contained in sections 3325-3341 of Shannon's Code.

Unless he be a broker, duly licensed and complying with the provisions of these sections of the Code, all contracts of insurance made by any person, except for himself, with unauthorized companies, on property in this State, are unlawfully made by such person.

Section 3316 of Shannon's Code is as follows:

"An agent or person shall be personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for or in behalf of any insurance company not authorized to do business in this State."

There is no escape from the meaning of this language. It must be conceded that these contracts of insurance procured for complainant by the defendants were unlawfully procured by defendants. Under the language of the statute, it makes no difference that the

policies were obtained indirectly through another firm of insurance men at Chicago.

Under the provisions of sections 3314 and 3315 heretofore quoted, it is unlawful for an agent to have any connection with a contract whereby foreign companies not admitted undertake to insure property in this State. Such a violation of law renders the agent liable to a criminal prosecution, and also, under section 3316, renders him financially responsible for all such contracts of insurance.

We think it can make no difference that complainant knew of this violation of the law by defendants. His knowledge did not make their act legal, or excuse them from the statutory penalties visited upon such dereliction.

The provisions of the statute are directed against companies and insurance agents, not against policy holders. The act is remedial in its nature, and was designed for the protection of the public.

The language of the act is that agents making such unlawful contracts of insurance shall be personally liable thereon; that is to say, the agent is liable as if he were the insurer—as if he individually had written the policy. There can be no question upon this record that, viewed as an insurer upon these several policies, defendants are liable to the complainant for the loss sustained.

In *Morton* v. *Hart,* 88 Tenn., 427, 12 S. W., 1026, this court held an agent personally liable, for writing a policy in a foreign company not admitted to do busi-

ness in Tennessee, for a loss that occurred by reason of the company's insolvency, although at that time there was no statute imposing such liability upon the agent in express terms.

The courts of the several States have generally held insurance agents writing policies in unauthorized companies, liable for loss. In some of the States there are statutes expressly rendering the agents liable, and in some States there are no such provisions. See *Burgess* v. *Jackson*, 18 App. Div., 296, 46 N. Y. Supp., 326; *Latham* v. *Harrod*, 71 Kan., 565, 81 Pac., 214; *Hartman* v. *Hollowell* 126 Iowa, 643, 102 N. W., 524; *Noble* v. *Mitchell*, 100 Ala., 530, 14 South., 581, 25 L. R. A. 238; *Price* v. *Garven* (Tex. Civ. App.), 69 S. W., 986.

A decree must be entered here for $7500 in favor of complainant against defendants, with interest from the date of the filing of complainant's bill. The costs of the case will be divided.

Petition to rehear denied.

METZNER *v.* STATE.

(*Jackson.* April Term, 1913.)

1. JURY. Waiver. Effect as to punishment.

Under Const., art. 6, sec. 14, providing that no fine shall be laid on any citizen exceeding $50, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than $50, a person indicted for selling intoxicating liquors within four miles of a schoolhouse under Acts 1909, ch. 1, fixing the punishment therefor at a fine of not less than $50 nor more than $500, who waived a jury trial, could not be sentenced by the trial judge to pay a fine of more than $50, since the constitution has conferred upon juries exclusive jurisdiction to levy a fine exceeding that amount, and such jurisdiction cannot be conferred upon any other tribunal by consent or waiver of the parties. (*Post*, *p.* 46.)

Acts cited and construed: Acts 1909, ch. 1.

Constitution cited and construed: Const., sec. 14, art. 6.

2. JURY. Trial by jury. Waiver in misdemeanor cases.

The defendant in a misdemeanor case, may waive a jury trial. (*Post*, *p.* 47.)

Cases cited and approved: In re McQuown, 19 Okla., 347.

FROM TIPTON.

Error from Circuit Court, Tipton County.—S. J. EVERETT, Judge.

SHERROD SMITH, for plaintiff in error.

W. W. FAW, Assistant Attorney-General, for the State.

Mr. Justice GREEN delivered the opinion of the Court.

The plaintiff in error was indicted for the offense of selling intoxicating liquors within four miles of a schoolhouse. The case was tried before the circuit judge without a jury, and Metzner was found guilty. The judge sentenced him to six months' imprisonment, and imposed a fine upon him of $400. Metzner has brought his case to this court, and the only question made here is the right of the court to impose upon him a fine of this amount.

Chapter 1 of the Acts of 1909, prescribing the penalty for this offense, provides for a fine of not less than $50, nor more than $500, and imprisonment for not less than thirty days nor more than six months.

Section 14 of article 6 of the constitution of Tennessee is as follows:

"No fine shall be laid on any citizen of this State that shall exceed $50, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than $50."

In behalf of the State it is insisted that, the plaintiff in error having waived a jury trial below, the trial judge thereby became vested with all the functions and powers of a jury in respect to the trial of this particular offense, including the right of imposing any fine which the jury might have imposed for a violation of the particular statute.

The section of the constitution quoted seems to confer upon a jury the exclusive right of assessing a fine in excess of $50. The language is that no fine exceeding that amount shall be imposed, unless assessed by a jury.

In our opinion, this constitutional provision withholds from the court or judge the right to inflict fines exceeding $50, and confers upon the jury exclusive power or jurisdiction to impose fines above that sum.

While it is settled in this State that a defendant in a misdemeanor case may waive a trial by a jury, we do not think by such a waiver he can confer on the judge power or jurisdiction plainly withheld from the judge by the constitution.

This is a matter of jurisdiction. Jurisdiction is conferred by law, and cannot be conferred by consent.

Power or jurisdiction to inflict a fine exceeding $50 having been by law conferred upon a jury alone, and withheld from the judges, no waiver or consent of parties can be invoked to endow a judge with this jurisdiction.

"It is a maxim in the law that consent can never confer jurisdiction, by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon consideration of general public policy defines and limits their jurisdiction, and this can neither be enlarged nor restricted by the act of the parties." Cooley's Const. Lim. 398.

In all jurisdictions, practically, it is held that a defendant cannot waive a jury trial in a felony case. The strongest reason given for this rule is that a jury is an essential part of the court having jurisdiction to try such offenses, and such jurisdiction cannot be conferred by consent of parties upon a court organized without a jury. 24 Cyc., 150; *In re McQuown,* 19 Okla., 347, 91 Pac., 689, 11 L. R. A. (N. S.), 1136. See note under this case in 11 L. R. A. (N. S.), 1136, where many authorities are collected.

So, under the constitution of Tennessee, a jury is the only tribunal upon which jurisdiction to levy a fine exceeding $50 is conferred, and such jurisdiction cannot be conferred upon any other tribunal by consent or waiver.

In *France* v. *State,* 6 Baxt., 478, it was held that the constitutional provision quoted was intended as a restriction upon the power of the courts or judges, and was not intended as a limitation upon the power of legislation; that, where the legislature had peremptorily fixed the fine at $500 for every violation of a particular offense, the court might impose that fine without the interposition of the jury.

This holding was very much weakened by the dissent of Judge Turney; but, in any event, there is nothing in *France* v. *State* conflicting with what we have said above. In that case it was distinctly recognized that section 14 of article 6 of the constitution prohibited a judge from imposing a fine exceeding $50 in cases

where the court had a discretion in fixing the amount of the fine.

We conclude that the learned circuit judge exceeded his authority in undertaking to assess this fine against plaintiff in error, and the judgment will be corrected by reducing the amount of the fine to $50. As corrected, said judgment will be affirmed, with costs.

FARNSWORTH-EVANS CO. *v.* CHICAGO, M. & G. R. CO. *et al.**

(*Jackson.* April Term, 1913.)

1. **CARRIERS. Carriage of goods. Connecting carriers. Liability. Delivery.**

Where goods, shipped over the roads of two connecting carriers under a bill of lading providing that the legal remedy for loss or damage should be only against the particular carrier in whose custody they actually were, were destroyed by fire after they had been placed upon a spur track at the junction point, and after waybills had been delivered to the common agents of the carrier at that point, who had made the clerical entries showing the exchange, but the cars containing the shipment had not yet been inspected and accepted by the connecting carrier in accordance with its custom, there was no actual completed delivery to the connecting carrier, and the first carrier is liable for the loss. (*Post, pp.* 53, 54.)

Cases cited and approved: Railroad v. Barnett, 69 Ark., 150; Hewett v. Railroad, 63 Iowa, 611; Buston v. Railroad (C. C.), 116 Fed., 235; Washburn-Crosby Co. v. Railroad, 180 Mass., 252; Merriam v. Railroad, 20 Conn., 354; Converse v. Transportation Co., 33 Conn., 166; Texas & Pacific Railroad Co. v. Clayton, 173 U. S., 348.

2. **CARRIERS. Carriage of goods. Connecting carriers. Liability. Delivery.**

The fact that the cars were customarily hauled by an engine of the connecting carrier to the track where they were inspected, for which a charge was made against the initial carrier, does

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*The authorities on the liability of a connecting carrier for loss beyond its own line, are reviewed in an extensive note in 31 L. R. A. (N. S.), 1. And upon the liability of a carrier of property for loss occurring on connecting line, but due to its own negligence, see note in 19 L. R. A. (N. S.), 1012.

not show actual possession by the connecting carrier before inspection and acceptance. (*Post*, *p.* 58.)

Case cited and approved: Huntting Elevator Co. v. Bosworth, 179 U. S., 415.

3. CARRIERS. Carriage of goods. Connecting carriers. Liability. Delivery.

Nor was the lodgment of the waybills with the agent, even though he be considered the agent of the connecting carrier, conclusive of delivery, so long as the physical movement to the track where the cars were inspected remained to be made by the first carrier. (*Post*, *p.* 59.)

Cases cited and approved: Missouri P. R. Co. v. McFadden, 154 U. S., 155; Bosworth v. Railroad Co., 87 Fed., 83; Railroad v. Bickley, 119 Tenn., 528; Mt. Vernon Co. v. Railroad, 92 Ala., 296; Aetna Ins. Co. v. Wheeler, 49 N. Y., 616; Insurance Co. v. Railroad, 124 Tenn., 57.

FROM SHELBY.

Appeal from Chancery Court, Shelby County.—FRANCIS FENTRESS, Chancellor.

PERCY & HUGHES and J. E. MCCADDEN, for plaintiff.

CARUTHERS EWING, FITZHUGH & BIGGS and THOS. A. EVANS, for defendants.

Mr. Justice WILLIAMS delivered the opinion of the Court.

On November 13, 1909, complainant, Farnsworth-Evans Company, made a through shipment of fifty bales of cotton from Ridgely, Lake county, a station on the line of the defendant Chicago, Memphis & Gulf

Railroad Company (hereafter called, for convenience, the first carrier), to Covington, Tipton county, a station of the other defendant, Illinois Central Railroad Company (hereafter called the connecting carrier). This shipment was in two cars, and two separate bills of lading were issued therefor. These two cars of cotton arrived at Dyersburg, the terminus of the first carrier, November 13, 1909, about 4:40 p. m. They were placed by the first carrier on what is known as Calcutt's new spur track, which was distant approximately two miles from the depot at Dyersburg, and was constructed as an industrial track to serve a sawmill; this spur being beyond the then existing yard limit. At about 8:40 the night of the same day the sawmill burned; the fire communicating to the two cars, destroying their contents.

This suit was brought by the consignor against both carriers to hold them liable for the loss thus occurring. Both of the carriers answered, denying liability, and it should be noted that there is no cross-pleading between the two defendant carriers containing allegations in regard to liability of the one to the other, or as to the primary liability.

It appears from the proof that the Calcutt new spur was not in regular use as a transfer spur, but that on occasion of a crowded condition of the yard proper, use was made of that track for interchange, under special arrangement to that end. The conductor of the first carrier, promptly after the arrival of his train at Dyersburg and the leaving of these two cars on the

spur referred to, turned in a report in writing, known as a "wheel report," and made delivery of the waybills for the two cars of cotton. A common agent served both carriers at Dyersburg, and both the report and the waybills were lodged with him shortly after 4:40 p. m. A clerk made up a report showing interchange of the cars, which is filed in proof, and shows that between 7 a. m. and 7 p. m., on November 13th, the connecting carrier had received from the first carrier the two cars in question. A *per diem* sheet is also filed, showing only one day's charge for one day's use by the first carrier of the two cars, to wit, on November 13th.

Testimony introduced by each of the carriers tended to show, in general terms, possession of these cars on the part of the other rather than of itself, at the time of the fire.

One of the determining factors of the case is a recitation in the bills of lading to the following effect:

"For all actionable loss or damage occurring in the transit of the property, the legal remedy shall be against the particular carrier only in whose custody the same may actually be at the time of the happening thereof."

A considerable portion of the brief in behalf of the connecting carrier is given to a discussion of its contention that any delivery indicated to have been made to it was but a constructive delivery, and that there could not have been a constructive delivery of the cars in question, because they were not in condition fit for

acceptance by it, in that the cars were not cleated and did not have their end windows closed when they were placed upon the spur track—both being requisite in order to acceptance by the connecting carrier. The connecting carrier's insistence is that nothing short of an actual acceptance of the cars would, in view of these defects shown to have existed, bind it to liability for the loss; and reliance is placed upon the rule to that effect announced in 1 Hutchinson on Carriers, sec. 151; *Railroad* v. *Barnett,* 69 Ark., 150, 61 S. W., 919; *Hewett* v. *Railroad,* 63 Iowa, 611, 19 N. W., 790, and *Buston* v. *Railroad* (C. C.), 116 Fed., 235.

In view of the clause in the bill of lading above quoted, we are of opinion that the true test of responsibility is *actual possession,* and that the liability must fall on that carrier in whose actual possession the cars were when they were burned.

The authorities are not clear in distinguishing, in certain phases, constructive delivery from actual delivery from a first to a connecting carrier. The Supreme Judicial Court of Massachusetts had before it a case involving such a delivery. It there appeared that a railroad company had a pier at the end of its line; that a steamship company, which formed a connection with it at that point, used and occupied a portion of the pier for the purpose of receiving freight there deposited by the railroad company for further transportation by the steamship company; that unloading freight in such manner was regarded by both companies as a delivery to the steamship company. A

quantity of flour thus placed was destroyed by fire. Suit was brought against the railroad company for its value. In deciding the question, which turned on delivery, Chief Justice Holmes said: "If it was understood in advance that, as soon as the goods were left on the wharf by the railroad company, the steamship company was free to take them at pleasure, and that it was expected to take notice of their presence and to assume responsibility for them without more notification, the deposit of the flour on the wharf was an actual delivery, without more." *Washburn-Crosby Co.* v. *Railroad,* 180 Mass., 252, 62 N. E., 590.

The above ruling was based upon the authority of earlier decisions by the Connecticut court in *Merriam* v. *Railroad,* 20 Conn., 354, 52 Am. Dec., 344, and *Converse* v. *Transportation Company,* 33 Conn., 166.

The Supreme Court of the United States had before it a case of claimed delivery by a first to a connecting carrier, under a bill of lading containing substantially the same clause as those in this case quoted above, in *Texas & Pacific Railroad Company* v. *Clayton,* 173 U. S., 348, 19 Sup. Ct., 421, 43 L. Ed., 725. Mr. Justice Harlan, in delivering the opinion of the court, said:

"In the case at bar, the facts plainly indicate that, although the goods had been placed by the first carrier upon the wharf, and although that was the place at which the steamship company was to receive or usually received goods from the railway company for further transportation, they were not in the actual possession or under the actual control of the connecting carrier

at the time of the fire. The connecting carrier had not given a mate's receipt for the cotton or assumed control of it. True, it had received notice that the goods were on the wharf and could be taken into possession; but such notice did not put the cotton into the actual custody of the connecting carrier. The opportunity given it to take possession, or its mere readiness to take possession, was not, under the contract, equivalent to placing the cotton in the actual custody of the steamship line. The undertaking of the railway company was to transport safely and deliver to the next connecting carrier. But its further express agreement was, in substance, that if any carrier incurred liability to the shipper in respect of the goods, that carrier alone was to be liable who, at the time the cotton was damaged or lost, had it in actual custody. In other words, the delivery to the connecting carrier, which would, as between the first carrier and the shipper, terminate the liability of such carrier, must have been a delivery that put the cotton into the actual, not constructive, custody of the connecting carrier. To hold otherwise is to eliminate from the contract the clause relating to actual custody. The entire argument of the learned counsel for the railway company in effect assumes that the contract means no more than it would mean if that clause were omitted. But the court cannot hold that clause is meaningless, or that it was inserted in the contract in ignorance of the meaning of the words 'actual custody.' Nor can it be supposed that the parties understood the contract to mean that the connecting

carrier was to be deemed to have actual custody from the moment it could have taken actual custody if it had seen proper to do so. So far as the shipper was concerned, the actual custody of the first carrier could not cease until it was in fact displaced by the actual custody of the connecting carrier. It may be that the railway company has good grounds for saying that, as between it and the connecting carrier, the latter was bound to take actual custody whenever the railway company was ready to surrender possession, and thereby relieve the latter from possible liability to the shipper in the event of the loss of the cotton while in its custody. That is a matter between the two carriers, touching which we express no opinion. But we adjudge that the shipper cannot be compelled, when seeking damages for the value of his cotton destroyed by fire in the course of its transportation, to look to any carrier except the one who had actual custody of it at the time of the fire. One of the conditions imposed upon him by the contract was that, if any carrier became liable to him, he should have no remedy except against the one having such actual custody. That remedy should not be taken from him by a construction of the contract inconsistent with the ordinary meaning of the words used."

The learned justice then proceeded to discuss the two Connecticut cases above referred to, observing that in neither of them was there any clause in the contract of carriage to the effect that the shipper, in enforcing his claim for liability, should look alone to the carrier

which had the actual custody of the goods at the time they were destroyed. It thus appears that in the opinion of that court the deliveries in the Connecticut cases were by it deemed to have been constructive deliveries.

Applying the rule of the *Clayton Case*, we have only to inquire with which of the two carriers was the actual possession of the two cars of cotton when they were destroyed. The proof is not satisfactory as to the movement of the cars from the Calcutt new spur to the yard proper, nor as to what duty, if any, was incumbent on the first carrier after depositing the cars on the spur beyond the yard limits in order to a delivery. It is established, however, as an uncontradicted fact, by the car inspector of the connecting carrier, that the inspection, as to sufficiency of equipment and of loading, customarily took place within the yard limits on a go-away track where they would be accepted, or rejected and turned back to the first carrier; that the engine of the connecting carrier moved cars from other tracks to the go-away track, but that in so doing the engine performed under contract the service for the first carrier which paid for the service. We conceive, therefore, that it is shown that a further act remained to be performed by the first carrier in order to an actual delivery to the connecting carrier—the switching of the two cars from the Calcutt spur to the go-away track within the yard. The fact that the engine of the connecting carrier was thus used did not render its use an acceptance of the cars by the connecting carrier as

on actual delivery. *Huntting Elevator Co.* v. *Bosworth*, 179 U. S., 415, 21 Sup. Ct., 183, 45 L. Ed., 256.

Neither should the lodgment of the waybills, even if deemed to have been with the agent of the connecting carrier, be treated as conclusive of delivery, so long as this physical movement remained to be made by or for the first carrier. *Missouri P. R. Co.* v. *McFadden*, 154 U. S., 155, 14 Sup. Ct., 990, 38 L. Ed., 944; *Bosworth* v. *Railroad Co.*, 87 Fed., 83, 30 C. C. A., 551; *Railroad* v. *Bickley*, 119 Tenn., 528, 107 S. W., 680, 14 L. R. A. (N. S.), 859, 123 Am. St. Rep., 754, 14 Ann. Cas. 910. To relieve the first carrier from liability and charge the connecting carrier, a complete delivery by the first carrier was requisite; and if anything remained to be done by the first carrier actual delivery was not consummated. The strict responsibility of a common carrier arises, generally, concurrently with the duty of immediate transportation by it when delivery is thus consummate. *Mt Vernon Co.* v. *Railroad*, 92 Ala., 296, 8 South., 687; *Aetna Insurance Co.* v. *Wheeler*, 49 N. Y., 616; 6 Am. & Eng. Ency. Law, 648; 6 Cyc., 486; *Insurance Co.* v. *Railroad*, 8 Baxt., 268; *Pencil Co.* v. *Railroad*, 124 Tenn., 57, 134 S. W., 613, 32 L. R. A. (N. S.), 323.

In decreeing the connecting carrier liable, as having had possession of the cotton when lost, the chancellor erred. Reversed, with decree here in accord with this ruling.

ODENEAL *v.* STATE.*

(*Jackson.* April Term, 1913.)

1. **CRIMINAL LAW. Appeal and error. Bill of exceptions. Evidence on motion for new trial.**

Where the record in a criminal case showed that the defendant had pleaded not guilty, but testimony was introduced on the motion for a new trial that he had never been properly arraigned, the question cannot be considered on writ of error, where the bill of exceptions fails to show that it contains all the evidence offered on the motion for a new trial. (*Post*, p. 62.)

Cases cited and approved: Eatherly v. State, 118 Tenn., 371; Ransom v. State, 116 Tenn., 355.

2. **CRIMINAL LAW. Instructions. Reasonable doubt. "Moral certainty."**

An instruction which correctly defines a reasonable doubt, and then states that, in order to convict, it is not required that the guilt of the defendant be established to an absolute certainty, but to a "moral certainty," that is, one which convinces and directs the understanding, and satisfies the reason and judgment of the truth of the charge, is not erroneous. (*Post*, p. 63.)

3. **CRIMINAL LAW. Instructions. Alibi.**

While it is better to treat an alibi as a point of evidence, and not as a defense, an instruction that the defense of alibi, when clearly and fully established by the proof, is a perfect defense, but that the jury should consider the proof with strictness and caution, as it is easily concocted, is not erroneous, where it also states that if, weighing the proof of the alibi impartially in connection with all the circumstances in the case, the jury

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*On the question of homicide as affected by negligence or lack of skill in treatment or care of wound, see notes in 22 L. R. A. (N. S.), 841, and 28 L. R. A. (N. S.), 665.

have a reasonable doubt as to the defendant's presence at the place of the crime, they should acquit him; any impropriety in the use of the words "when clearly and fully established by the proof," as requiring proof beyond a reasonable doubt, being sufficiently corrected by the rest of the instruction, so as not to mislead the jury. (*Post*, *pp.* 64, 65.)

Cases cited and approved: Thompson v. State, 24 Tenn., 138, 139; Chappel v. State, 45 Tenn., 92; Jefferson v. State, 3 Shan., 329, 333; Wiley v. State, 64 Tenn., 662; Legere v. State, 111 Tenn., 368, 377; Lawless v. State, 72 Tenn., 173, 181, 182; Owen v. State, 89 Tenn., 698.

4. CRIMINAL LAW. Appeal and error. Bill of exceptions. Evidence on motion for new trial.

Where the bill of exceptions in a criminal case does not state that it contains all the evidence in support of a motion for new trial, error in not granting the motion on the ground of newly discovered evidence cannot be considered. (*Post*, *p.* 66.)

5. HOMICIDE. Evidence. Sufficiency. Cause of death.

In a prosecution for homicide, evidence *held* sufficient to show that the death of the deceased was due to the injury inflicted by the defendant, and not to the surgeons who operated after he was wounded. (*Post*, *p.* 67.)

6. HOMICIDE. Cause of Death. Surgical operation.

One who unlawfully inflicts a dangerous wound upon another is liable for his death, whether it be direct, or occasioned by a surgical operation made necessary by the wound and performed with reasonable skill. (*Post*, *p.* 68.)

Cases cited and approved: Noble v. State, 22 L. R. A. (N. S.), 841-848; Tibbs v. Com., 138 Ky., 558; McCoy v. Com., 149 Ky., 447; Perdue v. State, 135 Ga., 277; Johnson v. State (Fla.), 59 South., 894.

FROM HAYWOOD.

Error to Circuit Court, Haywood County.—THOS. E. HARWOOD, Judge.

KINNEY & WILLS, for plaintiff in error.

ASSISTANT ATTORNEY-GENERAL FAW, for the State.

Mr. Chief Justice NEIL delivered the opinion of the Court.

The plaintiff in error was indicted in the circuit court of Haywood county for the murder of one Haywood Pender, was convicted of voluntary manslaughter, and sentenced to a term of seven years' confinement in the State penitentiary. On his motion for a new trial he introduced witnesses to show that he had never been properly arraigned, although the entry on the minutes showed that he had pleaded not guilty and had gone to the jury on that issue. Without going into the question as to how far the entry on the minutes may be contradicted in this manner, it suffices to say that the bill of exceptions fails to show that it contains all of the evidence offered on the motion for new trial. *Eatherly* v. *State*, 118 Tenn., 371, 101 S. W., 187; *Ransom* v. *State*, 116 Tenn., 355, 96 S. W., 953.

It is next assigned as error that the trial judge committed error in his charge upon the subject of reasonable doubt. His honor instructed the jury that the plaintiff in error was presumed to be innocent of each and all the offenses embraced in the indictment, and that this presumption remained a witness in his favor until his guilt should be established to the satisfaction

of the jury beyond a reasonable doubt. He then said to the jury that the State did not insist upon a conviction of murder in the first degree, and proceeded to define each subsequent degree, that is, murder in the second degree, and the two grades of manslaughter, and, as to each, instructed the jury that before they could convict the defendant of any one of these grades they must be satisfied of his guilt beyond a reasonable doubt. His honor further instructed the jury upon the subject of reasonable doubt as follows:

"A reasonable doubt is not a mere captious or imaginary doubt, but is a doubt that arises naturally in your minds after a fair and impartial consideration of all the evidence in the case, and leaves your minds in that condition that you do not feel an abiding conviction to a moral certainty of the truth of the charge. *The law, in order to convict, does not require the guilt of the defendant to be established to an absolute certainty; but it does require his guilt to be established by the proof to your satisfaction to a moral certainty, and that is a certainty that convinces and directs your understanding and satisfies your reason and judgment of the truth of the charge. If, therefore, the proof in this case convinces and directs your understanding and satisfies your reason and judgment of the defendant's guilt, you will convict him; if it does not, you will acquit him.*"

That portion of the above instruction which is objected to we have indicated by italics. Taking the part objected to in connection with the preceding sentence.

we are of the opinion that there was no error in the instruction given.

The next assignment of error is based upon an excerpt from the judge's charge upon the subject of an alibi which was sought to be proven by the plaintiff in error. We shall quote the whole of the charge upon this subject, indicating by italics that part objected to, viz.:

"Under his plea of not guilty the defendant also insists upon the defense of an alibi; that is, that he, the defendant, was not out at the place where the shot was fired and the deceased shot, at the time he was shot; but that he, defendant, was in the house, and did not know of the shooting until he heard the pistol fire, and then only by its report. *The defense of an alibi is a perfect defense, when clearly and fully established by the proof; but, like every other fact in the case, it is left to you to say whether it has or has not been established. You should look* [*to*] *and examine the proof as to the alibi with strictness and caution, to avoid being misled by it, as it is easily concocted, where there is a design to perpetrate a fraud on the State, or even where there is no such design, it is such an easy matter for witnesses to honestly mistake the day or the time to which they refer.* But you will consider the proof of an alibi in connection with the other proof in the case, by the aid of your own experience and observation, and weigh it fairly and impartially, with an honest effort to reach the truth, and, if so weighing and considering all the facts and circumstances in the case, you have and

entertain a reasonable doubt as to whether the defendant was out in front of the hall or house when the shooting took place, or was at that time in the house away from the place of the shooting, then you should acquit the defendant; but if you have no reasonable doubt but that he was out there when the shooting took place and is guilty you should convict him of each [misprint for 'such one'] of the three grades of homicide as you find him guilty."

The instruction, taken all together, was correct. *Thompson* v. *State,* 5 Humph. (24 Tenn.), 138, 139; *Chappel* v. *State,* 7 Cold. (47 Tenn.), 92; *Jefferson* v. *State,* 3 Shan., 329, 333; *Wiley* v. *State,* 5 Baxt. (64 Tenn.), 662; *Legere* v. *State,* 111 Tenn., 368, 377, 77 S. W. 1059, 102 Am. St. Rep., 781. We do not approve the words "when clearly and fully established by the proof," as these words seem to indicate the necessity of proving the point beyond a reasonable doubt. *Lawless* v. *State,* 4 Lea (72 Tenn.), 173, 181, 182; *Owen* v. *State,* 89 Tenn., 698, 16 S. W., 114. But these words are sufficiently qualified, by what is said in the subsequent part of this instruction on the subject of reasonable doubt, to prevent the jury from being misled thereby. The learned trial judge evidently used these words under the suggestion made in *Jefferson* v. *State,* supra, wherein it was said, after referring to the caution with which the jury should scrutinize the evidence upon the subject of alibi: "Of course, this caution should be accompanied, as it was in this case, with the

qualification that, when such defense is clearly and fully made out, it is very conclusive.'' As laid down in *Legere* v. *State*, supra, it is sufficient if the evidence upon the subject of the alibi raises a reasonable doubt as to whether the accused was at the place of the homicide or at a different place. It is better not to treat the alibi as a defense at all, but simply as a point of evidence, on which the jury shall consider whether a reasonable doubt is raised in their minds as to the guilt of the accused. ''Alibi is not regarded by the courts as a defense in a strict and accurate meaning of the term, but it is a mere fact shown in rebuttal of the State's evidence.'' 2 Am. & Eng. Ency. of Law & Pr., 1357, 1358.

It is next insisted that the court committed error in not granting a new trial because of the alleged newly discovered evidence of Dr. R. C. Dickinson. This matter cannot be considered, because the bill of exceptions does not show that it contains all of the evidence introduced upon the motion for new trial. Authorities supra.

Lastly, it is assigned as error that the verdict is not sustained by the evidence.

As to the fact of the shooting by plaintiff in error, there is much evidence on both sides; and after a careful examination of it all we are unable to say that the evidence in favor of the plaintiff in error preponderates against the verdict.

There is, however, one particular aspect of the evidence which has challenged our special attention. This

arises on the testimony of the two physicians who attended the plaintiff in error after he was shot.

These two physicians testified as follows:

Dr. W. H. Whitelaw:

"I was called with Dr. Royster to see a negro, Haywood Pender, on the 16th day of September of last year, and about twenty-four hours after he had been shot. I found that he had been shot in the lumbar region. I did not probe for the bullet. It ranged inward. It was a dangerous wound. We operated on him; took his bowels out; saw no trace of the bullet. The wound caused his death. I did not see him any more after that day; the day we operated on him. Found an infection in the abdomen as a result of the wound, but no trace of the bullet. I heard that he died not long after. I only saw him the one time. The wound certainly caused his death."

Dr. G. M. Royster:

"I was called to see Haywood Pender on September 16th of last year. He was shot on the 13th. Dr. W. H. Whitelaw went with me. The wound was two inches to the left of the median line; it ranged inward and toward the abdominal cavity. We operated on him, but found no trace of the bullet. He lived one month after he was shot; died on October 13th. I do not know and cannot say what caused his death. The wound was the remote cause of his death. Last time I saw him he was in a good condition and doing well. He might have died from a congestive chill. We operated on him; cut into the abdominal cavity. There

was some trace of pus, and the intestines were inflamed, caused by the wound. I cannot say that the bullet ever entered the abdominal cavity. I do not know whether the operation caused his death or not. It may have; but I do not think it did. The operation was a proper and necessary one. It is my opinion that the bullet wound contributed to or was the remote cause of his death."

The contention of the plaintiff in error is that the surgical operation caused the death of the deceased. It is not insisted that the operation was unskillful, or was the sole cause; nor is there any basis for such contention to be found in the evidence which we have quoted, and which is all there is on the subject. Dr. Whitelaw says it was a dangerous wound, and that it certainly caused the death of Pender. Dr. Royster says he does not know what was the cause of the death—meaning the immediate cause; that it might have been the result of a congestive chill; that it also might have been caused by the operation, but does not think it was so caused; that the operation was a proper one, and necessary. He further says: "The bullet contributed to or was the remote cause of his death." Dr. Whitelaw says that, while in the course of the operation they found no trace of the bullet, they did find an infection in the abdomen as the result of the wound. Dr. Royster says "there was some trace of pus, and the intestines were inflamed, caused by the wound."

The rule on this subject, supported by the weight of authority, is that, to exonerate the accused from the

charge of causing death by a dangerous wound unlawfully inflicted, it must appear, not only that the operation was performed in a grossly negligent and unskillful manner, but also that it was the sole cause of the death, and not one of a series of intermediate causes, following in the train of the injury, the original cause. One who unlawfully inflicts a dangerous wound upon another is held for the consequences flowing from such injury, whether the sequence be direct or through the operation of intermediate agencies dependent upon and arising out of the original cause. One of these dependent occurrences is the necessity of surgical aid, which may eventuate as the immediate cause of death. Surgical aid must be employed, with the attendant risks. Surgeons are not infallible. They are required to have and exercise only reasonable skill, measured by the rules of their art or profession. When the accused inflicts the injury that necessitates the operation, he is held to assume the risk attendant on it. Much is required before the surgeons can be substituted for the defendant. Wharton on Hom. (3 Ed.), secs. 34-39; note to *Noble* v. *State*, 22 L. R. A. (N. S.), 841-848; *Tibbs* v. *Com.*, 138 Ky., 558, 128 S. W. 871, 28 L. R. A. (N. S.), 665, and note; *McCoy* v. *Com.*, 149 Ky., 447, 149 S. W., 903; *Perdue* v. *State*, 135 Ga., 277, 69 S. E., 184; *Johnson* v. *State* (Fla.), 59 South. 894.

In view of the rule stated, it is clear that the death could not be attributed to the act of the surgeons.

It results that there is no error in the judgment of the court below, and it must be affirmed.

DIXIE FIRE INSURANCE CO. *v.* NELSON *et al.**

(*Jackson.* April Term, 1913.)

1. **EMBEZZLEMENT. Acts Constituting. Statutes. Construction.**

To establish embezzlement, under Shannon's Code, sec. 6576, punishing any officer, agent, or clerk of any company, or any clerk or agent of a firm or private person, who embezzles or fraudulently converts to his own use the money or property of another, which has come into his possession by virtue of his employment, it must appear that accused occupied the relation of officer, agent, or clerk, and that he fraudulently converted to his own use property of another, which came into his possession by virtue of the employment, and where the relation of debtor and creditor existed between accused and prosecutor at the time of the acts complained of there could be no embezzlement. (*Post*, *p.* 76.)

Code construed: Sec. 6576 (S.).

2. **INSURANCE. Fidelity Insurance. Embezzlement. Acts constituting.**

Where a general agent of an insurance company, authorized to appoint local agents, who reported to him the insurance effected by them and the amount of premiums, and remitted to him the premiums, he himself being required to report daily to the company the amount of premiums, and to make a monthly report showing balances due, which must be paid within 60 days, was permitted to deposit in his own name premiums collected and received from local agents without any objection from the company, which knew the facts and also that the general agent was the general agent of other insurance companies, and that he kept the funds of all the companies in his individual account in the banks, and checked on them all to meet the needs of his business,

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*On the question of embezzlement as affected by belief in right to property taken, see note in 41 L. R. A. (N. S.), 556.

the agent, failing to account for premiums collected and deposited, was not guilty of embezzlement of the funds of the company, within a bond conditioned to reimburse the company for losses by embezzlement. (*Post*, p. 76.)

Cases cited and approved: State of Washington v. John Covert, 14 Wash., 652-657; State v. McFetridge, 84 Wis., 473; United States Fidelity & Guaranty Co. v. People's Bank, 157 S. W., 414; Williams v. U. S. Fidelity Co., 105 Md., 490; Monongahela Coal Co. v. Fidelity Co., 94 Fed., 732.

Case cited and disapproved: Com. v. Smith, 129 Mass., 104-110.

FROM SHELBY.

Appeal from Chancery Court, Shelby County.—FRANCES FENTRESS, Chancellor.

R. LEE BARTELS, for appellants.

T. K. RIDDICK, TURLEY & TURLEY, and R. M. HEATH, for appellee.

Mr. Chief Justice NEIL delivered the opinion of the Court.

Two records were filed in this court under the same style; one embracing the proceedings brought against the defendant named in the caption and the American Bonding Company, and the other against him and the Title Guaranty & Surety Company. These bills were brought against defendant Nelson on two bonds, executed by the respective surety companies. These bonds are substantially the same, though differently

phrased. The only point that need now be mentioned is that they promise to indemnify the insurance companies against only such misappropriation of money on the part of their agent as shall amount to larceny or embezzlement. The point may be more fully stated by quoting the following from one of the bonds, interpolating the matter in brackets for a more perfect understanding of the excerpt.

"... shall ... make good and reimburse the employer [insurance company] to the extent of the sum of five thousand dollars ... of any pecuniary loss sustained by the employer [insurance company] of moneys, securities or other personal property belonging to the employer [insurance company] in the possession or custody of the employee [Nelson], or for the possession of which he is responsible, directly occasioned by larceny or embezzlement on the part of the employee, in connection with the duties of the office or position in the service of the employer [insurance company], hereinbefore referred to [general agent]. ...

"... this bond being intended only to cover such dishonest acts of the employee [Nelson] in connection with the position in the service of the employer [insurance company], hereinbefore referred to [general agent] as amount to larceny or embezzlement.

"... it being the true intent and meaning of this bond that the company shall be responsible only as aforesaid for moneys diverted from the employer [insurance company] through larceny or embezzlement on the part of the employee [Nelson]. ..."

Under the contract between the general agent and his companies he was permitted to appoint his local agents in the several States in which he was allowed to operate, viz., Tennessee, Mississippi, Arkansas, and Louisiana. These agents were to report to him the insurances effected by them and the amount of premiums contracted for, and were allowed sixty days to remit to Nelson. Similarly Nelson reported the policies and the amount of the premiums daily to the chief offices of the two companies, now consolidated under the name of the complainant mentioned in the caption. Nelson was required to make a monthly report to the home offices showing balances due. These reports contained a statement of the amount of premiums due from each agency in each state; it had columns also for reinsurance canceled, and returned premiums, and reinsurance effected with sums in each. The manner in which these figures were handled in the office of the general agency may be illustrated by a report made in March, 1909, on the Tennessee agencies, thus:

Premiums		$3,973 73
Reinsurance canceled		180 59
		$4,154 32
Less returned premiums.....	$1,062 59	
Less reinsurance effected	639 05	1,701 64
Net premiums		$2,452 68
Commissions on net premiums		735 80
Balance due Company		$1,716 88

From these reports the balances were transferred to the books of the insurance companies in the home offices. Nelson, under the contract, was allowed sixty days after the making of this monthly report within which to collect the premiums from his agents and remit to the company. The percentage allowed by the contract as compensation for the general agent was thirty per cent. on the gross premiums, and out of this Nelson was to pay his local agents. This was called a "flat" commission. There was a contingent commission of ten per cent. to be allowed at the end of the fiscal year on any profits realized on the year's transactions. The general agents, under the contract, were liable to the company for the premiums, whether collected from the local agents or not.

Under the course of business the general agents were permitted to deposit all funds collected by them on premiums in their own private accounts in banks of Memphis, and they paid the companies in their private checks. There was no specific agreement that this should be done, but it was the invariable practice.

About May, 1909, when the subject of the consolidation of the two companies—that is, the Dixie and the North State—was being agitated, objection thereto was raised by Nelson, who was a stockholder in the North State. The consolidation was effected, and he subsequently sold his stock. About June, 1909, the companies became dissatisfied with Nelson, on the ground that the agency was not profitable, and some discussion of the matter arose in the insurance papers, indicating

that the relation was to be dissolved. This angered Nelson. He also objected to the ending of his agency, claiming that he would be damaged thereby. A settlement, however, of the matter of damages was effected between Nelson and the companies by the allowance to him of a credit of $5,600. It was supposed at the time this credit was allowed that he would pay the balance due. He did not pay, and the insurance companies filed their bills as stated. That concerning the business of the North State was filed on July 29, 1910, and the bill of the Dixie on its own behalf was filed August 20, 1910, There were demurrers, and subsequently amended bills, and answers and crossbills, the particulars of which we need not go into. The result was that in the first-named case the chancellor, after allowing to Nelson a credit for the proportionate part of the $5,600, decreed against him the sum of $9,272.87 as a balance due the North State Fire Insurance Company, of which $5,000 was decreed against defendant the Title Guaranty & Surety Company on its bond, being the full amount of its penalty. In the other case, after allowing a similar credit, he decreed against Nelson, in favor of the Dixie Fire Insurance Company, $15,934.02, of which $10,000 was decreed against the American Bonding Company, being the full amount of the bond of the latter. Only the bonding companies appealed.

Many questions have been suggested and discussed in the very able briefs filed by counsel. We deem it necessary, however, to consider only one of these ques-

tions, and that is whether Nelson was guilty of embezzlement.

Our statute reads:

"Any officer, agent, or clerk of any incorporated company, or any clerk or agent of a copartnership or private person, except apprentices and other persons under the age of eighteen years, who embezzles or fraudulently converts to his own use any money or property of any other, which has come to his possession, or is under his care by virtue of such employment, shall, on conviction, be punished by confinement in the State penitentiary not less than five nor more than twenty years." Shan. Code, sec. 6576.

To make a case of embezzlement the person charged must occupy one of the relations indicated, "officer, agent, or clerk," and he must "fraudulently convert to his own use" the money or property of another person which has come into his possession, or is under his care by virtue of such employment. It is clear that, if a merely debtor and creditor relation existed at the time of the act or acts complained of, there could be no conviction under a charge of embezzlement. It may be conceded that such moneys as Nelson collected from his agents in the several States came into his hands by virtue of his agencies. We also think that the fact that he was granted sixty days in which to collect from his agents, and make remittance to the company, would not change the relation from that of agency to one of debtor and creditor.

As to that part of the contract which made Nelson liable for the premiums whether collected or not, there is authority to the effect that the relation would be simply one of debtor and creditor. *State of Washington* v. *John Covert*, 14 Wash., 652-657, 45 Pac., 304.

In this connection we are referred by counsel for complainants to the authorities upon the subject of sales of goods under a *del credere* agency. We do not think they apply. The peculiar body of law existing upon that subject has been in the main long established, and its principles are in general well settled; but it would only confuse the issue before us to attempt to apply these principles to the present controversy. It is said that *State of Washington* v. *Covert*, supra, does not apply, because the local agents in the several States were also agents of the insurance companies. In a sense they were; but their dealings were only with the general agent, and their accounts on the books in the home office were kept with him, and not with them. It is true, as already stated, that the general agent made daily reports, showing every policy issued as reports on this subject came to him from his local agents. But this was required, not that any charges might be made against these local agents, but only that accurate information might always be at hand showing the run of the general agent's business, and to enable the companies thereby to keep an eye on him. This is apparent from the correspondence between complainants and the bonding companies at the time the bonds were under way and before execution.

Aside from this, however, we are of the opinion that the manner in which Nelson was permitted to deal with the funds after they came into his hands is conclusive. It is proper, of course, for an agent to deposit the money of his principal in a solvent bank if the account shows that the money belongs to his principal. *State* v. *McFetridge,* 84 Wis., 473, 54 N. W., 1, 998, 20 L. R. A., 223. But if the agent deposits his employer's money in his own name, that is a conversion. *United States Fidelity & Guaranty Co.* v. *People's Bank,* 157 S. W., 414, Jackson, April term, 1913. If the principal knows that the agent is accustomed to making such conversion, and raises no objection to it, but accepts the agent's individual checks habitually for balances found due against the agent, he must be held as consenting to the conversion, and to the creating of the relation of debtor and creditor merely between himself and the agent, since the deposit in bank in the individual name of the agent creates the relation of debtor and creditor between the bank and the agent. The principal must be held to know that, where he consents to deposits in such manner, he agrees that the relation so based on his money deposited by the agent creates such relation of debtor and creditor between the agent and the bank, and that an indebtedness must thereupon arise from the agent to him from such use of the money. Any other view would involve the proposition that the principal could consent that the title to his funds might be vested in the bank through a loan made by the agent in his individual name to the bank, at the same time that

he would be in a situation to insist that the title still remained in himself—a manifest absurdity.

Nor is this a view based merely upon technical reasoning. It goes to the heart of the controversy. We do not gainsay the proposition that, if it be made to appear that an agent has appropriated the money of his principal to his own use, nothing else being shown, a case of fraudulent conversion is made out, under which a charge of embezzlement can be sustained. But if the principal habitually permits his agent to convert his money, by depositing it in bank in his own name, and accepts the agent's individual checks in payment from time to time, as occasion for payment arises, he must thereby be held to understand that the money is subjected to the perils of the agent's individual business, and when it is lost in that business it is then too late for the principal to bring a charge of embezzlement. That is just what happened in the present case. Nelson was agent, not only for the two companies suing here, but for several other companies. He kept the funds of all of the companies in his individual account in the banks, and checked on them all to meet the needs of his business. He lost heavily in the business of some of the other companies; there were also losses in the business which he was conducting for the two complainant companies. He drew on the general fund composing his deposit account for the conduct of his business as a general agent for all of the companies. He could not be justly charged with conscious wrongdoing when his principals, by their silent acquiescence in this

course of business, gave their sanction to the hazard which it entailed. In this view, the corrupt motive necessary to make out a case of embezzlement did not exist. 41 L. R. A. (N. S.), note, page 556.

This point is referred to in the case of *Williams* v. *United States Fidelity Co.*, 105 Md., 490, 66 Atl., 495, although it is not there given the emphasis which is here given it. See, also, *Monongahela Coal Co.* v. *Fidelity Co.*, 94 Fed., 732, 36 C. C. A., 444.

In opposition to this view we are referred to the following excerpt from *Com.* v. *Smith*, 129 Mass., 104-110, viz.: "If an agent, authorized to receive payment for goods sold by him on account of his employment, receives a check payable to his own order, the property in the check does not vest in him, and if he fraudulently converts the check or its proceeds he may be found guilty of embezzlement, although by the course of business between him and his employer he was in the habit of depositing such checks to his credit in a bank and sending his own checks in lieu thereof." But the court further said in that case (page 110): "But the jury found that the defendant had no authority to mingle the money of his employers with his own money, and so become thereby debtor for the amount belonging to them." This seems to take the point out of that case, so far as it applies to the present controversy.

We cannot doubt in the present case, from the full knowledge which the insurance companies had and the course of business referred to, the failure at any time to object to the method in which the deposits were

made, and the invariable habit of receiving his private checks, that the companies assented to the way in which the agent dealt with the fund. Indeed, Mr. Bush, the vice president of the companies, when asked about this method of payment, said, in substance, that it made no difference to the companies how they got the money, so that it was paid.

Under these facts there could be no embezzlement. Of course, there is nothing to indicate larceny. Under the terms of the bond, therefore, there could be no recovery.

The decree of the chancellor against the bonding companies is therefore reversed, and as to them the bills are dismissed, with costs.

SWIFT & CO. *v.* MEMPHIS COLD STORAGE WAREHOUSE CO.

(*Jackson.* April Term, 1913.)

1. **EQUITY. Jurisdiction of court of chancery. "All civil causes of action."**

Under Shannon's Code, sec. 6109, extending the jurisdiction of the chancery court to all civil causes of action triable in the circuit court, except for injuries to person, property, or character involving unliquidated damages, the words "all civil causes of action" mean only those civil actions which could have originated in the circuit court; the purpose of the act being to give litigants the option of bringing suits either in the circuit or the chancery court. (*Post*, *p.* 87.)

Acts cited and construed: Acts 1877, ch. 97.

Case cited and approved: Simmons v. Leonard, 89 Tenn., 623.

2. **EQUITY. Jurisdiction of court of chancery.**

Shannon's Code, sec. 6109, giving the court of chancery jurisdiction of all civil causes of action heretofore triable in the circuit court, does not give the court of chancery exclusive, but merely concurrent, jurisdiction of such actions. (*Post*, *p.* 87.)

Acts cited and construed: Acts 1877, ch. 97.

Cases cited and approved: Jackson v. Nimmo, 71 Tenn., 597; Ramsey v. Temple, 71 Tenn., 252; Williams v. Burg, 77 Tenn., 459; Hawkins v. Kercheval, 78 Tenn., 542; Frazier v. Browning, 79 Tenn., 254; Glenn v. Moore, 79 Tenn., 256; State v. Keller, 79 Tenn., 401; Kirkseys & Son v. Crandall, 90 Tenn., 532; Ducktown Sulphur & Iron Co. v. Fain, 109 Tenn., 65; McCreary v. First National Bank, 109 Tenn., 129; Trust Co. v. Hotel Co., 124 Tenn., 664.

3. **EQUITY. Jurisdiction of court of chancery. "Liquidated damages."**

Under Shannon's Code, sec. 6109, extending the jurisdiction of the court of chancery to all civil causes of action, except for

injuries to person, property, or character involving unliquidated damages, an action for damages for injuries to eggs caused by the negligence of the warehouseman in allowing them to absorb fruity flavors cannot be maintained in the court of chancery, for not only is the action based on an injury to property, but the damages are unliquidated; the contract of bailment not fixing the amount, and "liquidated damages" being the amount of damages which have been fixed by anticipatory agreement between the parties (citing 5 Words and Phrases, 4174.) (*Post*, *p.* 93.)

Acts cited and construed: Acts 1877, ch. 97; Acts 1851-52, ch. 365, sec. 9.

Code cited and construed: Sec. 6131 (S.); sec. 4321 (T. & S. and 1858).

Cases cited and approved: Ramsey v. Temple, 71 Tenn., 252; Kirkseys & Son v. Crandall, 90 Tenn., 532.

ON PETITION TO REHEAR.

4. EQUITY. Statutory provisions. Repeal by implication.

Acts 1851-52, ch. 365, sec. 9, which was carried into Shannon's Code as section 6131, provides that the filing of an answer is a waiver of objection to the jurisdiction of the court of chancery and the cause will not be dismissed, but will be determined on its merits, although the court be of the opinion that the matters complained of are of legal cognizance. Acts 1877, ch. 97, carried into Shannon's Code as section 6109, provides that the court of chancery shall have jurisdiction of all actions triable in the circuit court, except actions for injuries to person, property, or character involving unliquidated damages. *Held*, that the act of 1851, in so far as it applied to the exceptions in the act of 1877, was repealed by implication, although it remained in force as to objections to jurisdiction over the person of the defendant or the local *status* of the litigation, and consequently the filing of an answer by the defendant is not a waiver of objections to jurisdiction, where the action is one falling within the exceptions of the statute. (*Post*, *p.* 96.)

Acts cited and construed: Acts 1851-52, ch. 365; Acts 1877, ch. 97.

Code cited and construed: Sec. 6131 (S.); sec. 4321 (T. & S. and 1858).

Cases cited and approved: Holcomb v. Canady, 49 Tenn., 612; Frazier v. Tubb, 49 Tenn., 666; Rankin v. Craft, 48 Tenn., 712; Bennett v. Wilkins, 45 Tenn., 240; Lowry v. Naff, 44 Tenn., 372; McNairy v. Nashville, 61 Tenn., 251; Dean v. Snelling, 49 Tenn., 484; Kirkman v. Snodgrass, 40 Tenn., 370; Falls v. Building & Loan Association, 105 Tenn., 24; Baker v. Mitchell, 105 Tenn., 610-612.

5. COURTS. Equity. "Jurisdiction." Consent. Waiver.

"Jurisdiction" is the power constitutionally conferred upon a judge or magistrate to determine causes according to law and carry his sentence into execution; hence as the act of 1877 (Shannon's Code, sec. 6109), specifically excepts certain causes from the jurisdiction of court of chancery, a party cannot, even by express waiver or consent, confer upon that tribunal jurisdiction to hear the excepted causes. (*Post*, *p.* 100.)

6. BAILMENT. Degree of care.

A bailee for hire is required to exercise only ordinary care, which is that which a capable person engaged in the same work is accustomed to exercise. (*Post*, *p.* 101.)

Case cited and approved: Lancaster Mills v. Merchants' Compress Co., 89 Tenn., 1-33.

7. EQUITY. Warehousemen. Injuries to property. Liquidated Damages.

Where a warehouseman stored eggs, issuing a receipt stating that the property was stored at the owner's risk, that its condition and quality were unknown, but that it would be returned to the owner at his request, the contract is a mere bailment for hire, obligating the bailee to use ordinary care, and the law cannot by implication raise an agreement on the part of the warehouseman to return to the owner eggs of good and merchantable quality, or to pay the difference between

the market value of stored eggs of good quality and the value of the eggs actually redelivered; hence an action for damages to the eggs stored is necessarily one for unliquidated damages. (*Post*, *p.* 101.)

8. LIMITATION OF ACTIONS. New action after reversal.

Under Shannon's Code, sec. 4446, providing that if an action is commenced within the time limited, and judgment is rendered against the plaintiff upon any ground not concluding his right of action, or is reversed on appeal, he may commence a new action within one year, defendant, who secured a reversal because the action was improperly brought in the court of chancery, will be enjoined by the decree of reversal from setting up the defense of limitations against a new action begun within the year. (*Post*, *p.* 102.)

Code cited and construed: Sec. 4446 (S.); sec. 2755 (T. & S. and 1858).

Cases cited and approved: Smith v. McNeal, 109 U. S., 426, 3 Sup. Ct., 319, 27 L. Ed., 986; Cole v. Nashville, 45 Tenn., 639; Railroad v. Pillow, 56 Tenn., 248; Love v. White, 5 Tenn., 210; Chilton v. Scruggs, 73 Tenn., 313; Hughes v. Brown, 88 Tenn., 578.

FROM SHELBY.

Appeal from Chancery Court, Shelby County.—F. H. HEISKELL, Chancellor.

HENRY CRAFT, for appellant.

MARION G. EVANS and JAMES H. MALONE, for appellee.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

This was an action for damages for breach of a contract of bailment. The bailment was for hire. Swift & Co. was the bailor; the warehouse company was the bailee. The subject-matter covered by the contract was about 6,000 cases, or 2,160,000 eggs.

The complainant was an Illinois corporation; the defendant, a Tennessee corporation. The former was engaged in the business of buying and selling meats, eggs, and other products of similar character; the latter was conducting a cold storage warehouse business in Memphis, Tenn. Such was the business of the respective parties at the time of the bailment and the alleged breach of the contract sued on.

The bill was met by a demurrer raising the question that the chancery court was without jurisdiction because the action was one to recover unliquidated damages for injury to the property of complainants. This demurrer the court overruled, to which action of the court defendant excepted, and thereafter answered the bill and made demand for a jury to try the issues joined, whereupon the cause was submitted to a jury under issues stated in the charge of the court. At the close of complainant's evidence in chief, defendant moved the court to dismiss for want of jurisdiction upon the same ground relied on in the demurrer. This motion the court overruled, and defendant excepted, and, thereupon the cause proceeded to verdict, which

was in favor of complainant and for the sum of $7,151.18. From the decree based on this verdict, defendant appealed and has assigned many errors, the first of which is in substance that the chancery court was without jurisdiction, and that the chancellor was in error in his rulings to the contrary. The disposition of this assignment of error necessitates a review of Acts 1877, ch. 97, now carried as section 6109, Shannon's Code, and our decisions thereon.

In the outset, it may not be amiss to observe that, upon analysis, it is manifest that the act of 1877 extended the jurisdiction of the chancery court to all civil causes of action theretofore triable in the circuit court with three exceptions, and these exceptions were such cases involving unliquidated damages when based on (1) injuries to person; (2) injuries to property; (3) injuries to character.

The words "all civil causes of action" as used in the act have been construed by this court to mean only those civil actions which could have originated in the circuit court; the purpose of the act being to give litigants the option of bringing suits in such cases either in the circuit court or in the chancery court. *Simmons* v. *Leonard,* 89 Tenn., 623, 15 S. W., 444.

The jurisdiction conferred by the act was concurrent and not exclusive. The act did no more than open the door of the chancery court to a class of cases against which that door had formerly been closed. The door remained closed to the three classes of cases above noted as exceptions.

Notwithstanding the apparently plain terms of the act, its practical application has provoked much discussion.

Its constitutionality was assailed and sustained in *Jackson* v. *Nimmo*, 71 Tenn. (3 Lea), 597. Of it Judge Freeman, in delivering the opinion of the court in that case, said: "The intention of the legislature is plainly expressed. It is to increase the jurisdiction of the chancery court. That increase is to be effected by giving the chancery court jurisdiction, concurrent with the circuit court, in all causes of action now triable in the circuit court, except injuries to person, property or character, involving unliquidated damages. This statement of what is the intention of the legislature, taken from the language of the act of itself is so clear and plain that we cannot misunderstand it, and find no need of the application of rules of construction. It cannot be made clearer or plainer than the act has made it."

The case last cited was decided at the December term, 1879. At the preceding September term this court had under consideration the case of *Ramsey* v. *Temple*, 71 Tenn. (3 Lea), 252. In that case the bill was filed in the chancery court to recover damages of an attorney for ordering an execution held up, from which action it resulted that complainant lost the amount of the judgment on which execution was issued. The court did not in that case pass upon the validity of the act, but held that it should be strictly construed, and, speaking of the case there in judgment, said:

"The acts complained of are certainly in the nature of torts. 'An injury to property' in its broadest sense would certainly include any tort injuring or destroying a chose in action, or rendering it valueless by defeating or obstructing the plaintiff in its collection. From the very nature of the acts complained of, the damages are unliquidated and unfixed by the contract. They may be greater or less according as the extent of the injury may be shown by the proof; and the character of the question is not changed by the allegation that the injury complained of has resulted in the loss of the entire debt. This allegation does not render the damages in their nature liquidated or certain."

The demurrer to the bill in that case was sustained, and the bill dismissed.

In a later case, *Williams* v. *Burg*, 77 Tenn. (9 Lea), 459, where a bill was filed to recover damages for breach of a covenant of warranty in a deed, it was said:

"It is next argued that the demurrer should have been sustained upon the ground that the action sounds in damages, and is not such an action as the chancery court had jurisdiction of, even under our act of 1877. If this were true—which, however, it is not—still the chancery court has jurisdiction of even purely legal demands in attachment cases; the ground of attachment in this case being that the defendant is a non-resident."

So, in that case, the jurisdiction of the chancery court was sustained. Clearly it was not based upon an in-

jury to person, property, or character within the meaning of the act.

Following the case above cited, *Hawkins* v. *Kercheval,* 78 Tenn. (10 Lea), 542, was decided. The bill as amended in that case was a proceeding in substance to compel the mayor and police commissioners of a city to reinstate complainant in an office from which he had been suspended by the mayor and never legally removed by the commissioners. It was held that the mandamus sought by the bill was a form of civil action of which, by virtue of the act of 1877, the chancery court acquired concurrent jurisdiction, inasmuch as the action did not involve unliquidated damages for injuries to person, property, or character.

Frazier v. *Browning,* 79 Tenn. (11 Lea), 254, was an ejectment bill, and it was held by this court that of such a bill the chancery court acquired jurisdiction by virtue of the act of 1877. Clearly such a cause of action did not fall within any exception in the act of 1877.

In a later case, where the bill was based upon alleged negligence of the circuit court clerk in the discharge of his official duty, by which negligence complainant was deprived of the benefit of an execution which had been levied on 230 bushels of wheat, it was held that the case did not present an injury to property within the meaning of the act of 1877, and the concurrent jurisdiction of the chancery court under that act was sustained. *Glenn* v. *Moore,* 79 Tenn. (11 Lea), 256.

In another case, where the suit was based upon the failure of a county surveyor to properly survey a tract of land, by which failure complainants sustained a loss, it was held that the cause of action was not based on injury done to person or property within the meaning of the statute, as in the case of a trespass to the one or the other, but, on the contrary, that the case was based on a loss accruing by reason of an alleged breach of duty which could be measured by the value of the property lost. *State* v. *Keller,* 79 Tenn. (11 Lea), 401.

Again, where a principal sued his agent for a sum lost to the principal by the act of the agent in taking an invalid acceptance of a draft, it was said:

"The wrong complained of was not an injury to the person, character, or property of complainants within the meaning of the act of 1877."

The court in the same case passed upon the meaning of the term "unliquidated damages" as used in that act, saying:

"Strictly speaking, 'unliquidated damages' are such damages as have not been ascertained or fixed by contract." *Kirkeys & Son* v. *Crandall,* 90 Tenn., 532, 18 S. W., 246.

In *Ducktown Sulphur & Iron Co.* v. *Fain,* 109 Tenn., 65, 70 S. W., 813, a corporation which was a defendant in twenty-one suits at law, brought by sundry persons, each suit arising out of an injury alleged to have been sustained as a result of noxious gases emitted from roast piles of copper ores, sought by original bill to enjoin the twenty-one lawsuits and to have with each of

the separate plaintiffs in those suits a separate accounting in the chancery court; but this court held that the act of 1877 did not confer jurisdiction in such a case on the chancery court, and that, upon the contrary, the cause fell within the exceptions in that act.

In another case, where the complainant sought to recover from a national bank the statutory penalty for knowingly collecting usurious interest, this court held that, inasmuch as the cause would have been triable in the circuit court prior to the passage of the act of 1877, that act conferred jurisdiction on the chancery court. No mention was made in the opinion of the fact that such an action was in no sense one based on injuries to person, property, or character, though it must have been true that this fact was of controlling weight in the conclusion reached by the court in that case. *McCreary* v. *First National Bank,* 109 Tenn., 129, 70 S. W., 821.

Where the complainants sought by their bill a perpetual injunction restraining a smoke nuisance, and, in the alternative, damages for injuries caused by the smoke to certain property owned by complainants, this court said:

"Chapter 97 of the Acts of 1877 excepts from the jurisdiction of the chancery court cases of injury to property involving unliquidated damages. The chancery court obviously would have had no jurisdiction to determine this claim for damages, had it been presented alone," etc. *Bank & Trust Co.* v. *Hotel Co.,* 124 Tenn., 664-666, 139 S. W., 719, 39 L. R. A. (N. S.), 580.

Reverting now to the case in hand, it is clear that, among the cases cited where the jurisdiction of the chancery court has been challenged and sustained, there is not one which furnishes a precedent for the claim that the chancery court, by the act of 1877, acquired jurisdiction of such a cause of action as is presented by this record. It is equally clear that this record does not present a case of equitable cognizance independent of the act of 1877. It is manifest, from the contract as averred and proven, that the minds of the parties thereto never met touching the question of damages in the event certain of the eggs should be damaged by absorption of fruity flavors. Therefore we must conclude that the damages sued for are purely unliquidated, unfixed, and uncertain.

"Liquidated damages" are thus defined by Bouvier:

"Damages, the amount of which has been determined by anticipatory agreement between the parties. Damages for a specific sum, stipulated or agreed upon as a part of a contract as the amount to be paid to a party who alleges and proves a breach of it." Bouvier's Law Dictionary, vol. 2, Rawle's Revision, 261.

To the same purport are a number of definitions and illustrations in volume 5, p. 4174, *et seq.*, Words and Phrases.

Upon the same subject, see also our own cases. *Ramsey* v. *Temple*, 71 Tenn. (3 Lea), 252; *Kirkeys & Son* v. *Crandall*, 90 Tenn., 532, 18 S. W., 246.

The contract called for the redelivery of the eggs by the bailee to the bailor when called for by the latter.

The bill avers that the redelivery was made. The claim for damages is predicated on alleged negligence of the bailee in permitting some of the eggs to absorb, while in storage, certain fruity flavors, which decreased their market value and otherwise damaged the bailor. The extent of this damage it is clear from the averments of the bill must depend wholly upon proof, and is certainly as unfixed, uncertain, and unliquidated as we can imagine anything to be.

Whatever may have been the extent of the injury to the market value of the eggs, arising from the negligence of the bailee out of the manner of storage, it is clear that such negligence according to the averments of the bill arises to the eminence of a wrong against the property rights of the complainant, and amounts to an injury to property within the act of 1877.

Therefore we think that the cause of action as presented by the bill, and as shown by the proof, involved unliquidated damages and was based on an injury to property within the meaning of the act of 1877, and that the chancellor was in error in his rulings to the contrary.

To fall within exception No. 1 of the act of 1877, the cause of action must involve unliquidated damages and be based on injuries to person. To fall within exception No. 2 of the act, the cause must involve unliquidated damages and be based on injuries to property. To fall within exception No. 3 of the act, the cause of action must involve unliquidated damages and be based on injuries to character.

Of a cause of action falling within any one of these exceptions the act confers no jurisdiction on the chancery court. The case in hand falls within the second exception above.

What we have said in this opinion on the subject of the jurisdiction of the chancery court has no application, of course, except to cases where the jurisdiction of that court over the particular case depends upon the act of 1877.

It results, of course, from these views, that the decree must be reversed, and the bill dismissed.

ON PETITION TO REHEAR.

The petition to rehear refers us to the following cases: *Holcomb* v. *Canady*, 2 Heisk., 612; *Frazier* v. *Tubb*, 2 Heisk., 666; *Rankin* v. *Craft*, 1 Heisk., 712; *Bennett* v. *Wilkins*, 5 Cold., 240; *Lowry* v. *Naff*, 4 Cold., 372; *McNairy* v. *Nashville*, 2 Baxt., 251; *Dean* v. *Snelling*, 2 Heisk., 484; *Kirkman* v. *Snodgrass*, 3 Head., 370; also to sections 247 and 260, Gibson's Suits in Chancery, and to section 6131, Shannon's Code, which reads as follows:

"The filing of an answer is a waiver of objection to the jurisdiction of the court, and the cause will not be dismissed, but heard and determined upon its merits, although the court may be of opinion that the matters complained of are of legal cognizance."

This section appeared in substance as section 9 of chapter 365 of the Acts of 1851-52, in these words:

"Sec. 9. Be it enacted, that, where an answer is made to a bill in equity, it shall be a waiver to any objection to the jurisdiction of the court; and although the matter complained of is, in the opinion of the court, a matter of legal jurisdiction, the chancellor shall decree relief according to the law without dismissing the bill, and, in case of any dispute as to the matter of fact, either party shall be entitled upon application to a trial by jury."

Section 6131, as it appears in Shannon's Code, was section 4321, Code 1858.

The reason, no doubt, underlying the holding of this court in *Holcomb* v. *Canady*, 2 Heisk., 612, cited supra, and other cases of that line, to the effect that the filing of an answer was a waiver of objection to the jurisdiction of the chancery court over the persons of the parties litigant, as well as over the subject-matter of the suit, was that by the passage of the ninth section of the act of 1851, and section 4321 of the Code of 1858, the legislature had expressly conferred jurisdiction upon the chancery court to try matters of legal cognizance where objection to its jurisdiction so to do had been waived by the defendant by filing an answer to the bill; and manifestly the reason underlying those decisions was sound, and, if our legislation stood to-day as it did at the time of the rendition of those decisions, we would have no difficulty in following those cases in the disposition of the question in this case. But it is to be observed that all of the cases above cited were decided before the passage of chapter 97 of the Acts of

1877. This act wrought a very material change in, and a distinct and considerable enlargement of, the jurisdiction of the chancery court. Under the act of 1877, the party complaining may as of right invoke the jurisdiction of the chancery court in all civil causes of action within the meaning of that act theretofore triable in the circuit court, with the exceptions noted in our original opinion in this case; and by the act of 1877, the right is taken away from the defendant to object to the jurisdiction of the chancery court because the subject-matter is of legal cognizance, if it be true that the complaint is a "cause" within the meaning of the act, and not upon its facts falling within one of the three exceptions noted in our original opinion in this case.

The act of 1877 is a distinct repeal by implication of the jurisdiction of the chancery court conferred by section 9 of the act of 1851-52, and by section 4321 of the Code of 1858, and now carried as section 6131, Shannon's Code, to pass upon the merits of all causes where objection to its jurisdiction is waived by answer, "although the court may be of opinion that the matters complained of are of legal cognizance," because that jurisdiction cannot stand together with the exceptions noted in the act of 1877. This act clearly means that the chancery court shall not have jurisdiction to render any decree on the merits of a civil cause of action within any one of the exceptions noted in it. The former legislation is inconsistent with this meaning of the act of 1877, and was impliedly repealed by the latter act.

But we are not to be understood as holding that anything in the act of 1877, either expressly or by implication, repealed section 4321, Code of 1858, now section 6131, Shannon's Code, in so far as that section now has the effect of providing that the filing of an answer is a waiver of objection to the jurisdiction of the chancery court over the person of the defendant or the "local *status*" of the "litigation," or in a case of equitable cognizance, such as *Falls* v. *Building & Loan Association,* 105 Tenn., 24, 58 S. W., 325, or we may safely add in any case where the application of section 6131, Shannon's Code, would not operate to assert jurisdiction of the chancery court to pass on the merits of a cause excepted from its jurisdiction by chapter 97 of the Acts of 1877.

The view of our legislation herein set out explains an apparent conflict between the line of authorities relied on by petitioner, and cited supra, and what was said by this court through Mr. Justice Wilkes in *Baker* v. *Mitchell,* 105 Tenn., 610-612, 59 S. W., 137, 138, where the precise question was whether the defendant, who raised the question of the jurisdiction of the court by filing a demurrer but also at the same time filed an answer, had by the filing of the answer waived the right to insist on his demurrer. The court said:

"We are of opinion that the question as to jurisdiction in this case is one based upon the subject-matter of the controversy, and not the person of the defendant or the local *status* of the litigation, and that it could be made at any time" (citing *Lowe* v. *Morris,* 4 Sneed,

69; *Merchant* v. *Preston*, 1 Lea, 280; *Starnes* v. *Newsum*, 1 Tenn. Ch., 245).

And, continuing, the court said: "Indeed, the want of jurisdiction of the subject-matter could not be waived, nor could it be conferred by consent, appearance, plea, or answer, if it does not exist by law. See cases collated Webb & Meigs' Digest, p. 2058, sec. 11."

The subject-matter of the litigation in that case was the right to the office of mayor of the town of Greenville, Tenn. The action presented was an election contest, and the claim that jurisdiction existed in the chancery court to try the case was based on chapter 97, Acts of 1877; but it was held that the jurisdiction did not exist, for the reason that "a proceeding of this character" is not a "cause" within the meaning of that act. We cannot doubt but that the court in the consideration of that case noted the exact distinction which we have pointed out in this opinion between the legislation effected by the act of 1877 and that on which the cases rest upon which petitioner relies.

What we have said is our response to the insistence made by petitioner that the answer of defendant in this case amounted to a waiver of its objection to the jurisdiction of the chancery court over the subject-matter of this suit.

We hold that under the act of 1877 the filing of the answer was no bar to the right of the defendant in this case at the conclusion of complainant's evidence to move the court to dismiss the suit for want of jurisdiction. Even the express waiver or consent of defendant

would not have conferred jurisdiction on the court over the subject-matter of this suit.

Jurisdiction has been well defined to be a power constitutionally conferred upon a judge or magistrate to take cognizance of and determine causes according to law and to carry his sentence into execution. Cyc., vol. 11, p. 660.

That power, under the facts of this case, the chancery court did not have. The cause of action was for damages unliquidated by the contract of the parties, and unliquidated by anything they said or did after the contract of bailment was made. No rule of law will operate to liquidate damages, unless there be words or acts of the parties to the contract in evidence from which it may fairly be implied that the amount, or a basis for computation of the amount, of the damages was agreed upon by the parties. The law does not *sua sponte* make contracts for parties, nor liquidate damages, where the parties by their acts and words have left the question open.

Although a contract of bailment much different was averred in the bill, when complainant's proof was in, it was clear that the actual contract entered into by the parties was that, for the price of thirty cents per case per season, the bailee received the eggs and issued a warehouse receipt for each case, stating in substance that the property was stored at the owner's risk, that its condition and quality were unknown to the bailee, and that it would be returned to the owner at his request upon payment of storage and other charges.

Under such a contract, the warehouse company was a mere bailee for hire, held only to exercise ordinary care, or "the care and diligence which good and capable warehousemen, experienced and faithful in the particular department are accustomed to exercise when in the discharge of their duties." *Lancaster Mills v. Merchants' Compress Co.*, 89 Tenn., 1-33, 14 S. W., 317, 324 (24 Am. St. Rep., 586).

Now, when the written receipt upon which each case of eggs was stored shows that the "condition and quality of the eggs" was a fact unknown to the warehouseman, how can the law by implication raise a contract binding it to return to the bailor at his request eggs of good and merchantable quality, and, in the event of his failure so to do, that he will pay to the bailor the difference between the market value of storage eggs of good and merchantable quality and the market value of the eggs at the time of redelivery? The law implies no such contract. It makes no unjust implication, none which will aid one party in the perpetration of fraud upon the other. If the condition and quality of the eggs had been known to the bailee at the time of storage, the law would raise the implication above stated, but not otherwise.

So it is idle in the face of these facts to insist that any rule of law liquidated the damages under the facts of this case.

It is equally clear that this suit was based upon an injury to property within the meaning of the act of 1877. It is said the injury arose out of a breach of the

contract alleged by the bill; but this, if true, does not destroy or minimize the existence of the fact that the basis of the suit is an alleged injury to property, and that the damages sought flow from such injury.

It is not within our rights to bend the law to meet hard cases. It is our duty to administer it as written. The petition to rehear presents no new matter, except the one fully discussed in the first part of this opinion.

But the decree of this court dismissing this suit will enjoin the Memphis Cold Storage Warehouse Company from setting up or relying on the statute of limitations as a defense to such suit upon the merits of this cause in the circuit court of Shelby county, Tenn., as Swift & Co. may commence within one year from the date of the above decree (*Smith* v. *McNeal,* 109 U. S., 426, 3 Sup. Ct., 319, 27 L. Ed., 986; *Cole* v. *Nashville,* 5 Cold., 639; *Railroad Co.* v. *Pillow* 9 Heisk., 248; *Love* v. *White,* 4 Hayw., 210; *Chilton* v. *Scruggs,* 5 Lea, 313; *Hughes* v. *Brown,* 88 Tenn., 578, 13 S. W., 286, 8 L. R. A. 480; Code 1858, sec. 2755; Shannon's Code, sec. 4446); it being our opinion that, under the provisions of the above statute and the facts of this case, the complainant is entitled to the injunction above awarded.

The petition to rehear will be dismissed, and decree entered dismissing this suit as announced in our original opinion.

STANSBURY *et al. v.* EMBREY *et al.*

(*Jackson.* April Term, 1913.)

1. **PRINCIPAL AND AGENT. Collection of note. Payment at bank.**

That a note is made payable at a particular bank, or at any bank, does not make the bank the owner's agent to receive payment, if the note is not placed by him with the bank. (*Post*, *p.* 107.)

Cases cited and approved: Cheney v. Libby, 134 U. S., 68; Ward v. Smith, 7 Wall. (U. S.), 447; Hills v. Place, 48 N. Y., 520; Adams v. Hackensack, 44 N. J. Law, 638; Griswold v. Davis, 125 Tenn., 229.

2. **TENDER. Notes. Payment at bank.**

The making of a note payable at a named bank entitles the maker to tender payment there; a tender there being available to prevent a forfeiture and stop the running of interest, though the note be not at that bank when payment is tendered. (*Post*, *p.* 108.)

Cases cited and approved: Cheney v. Libby, 134 U. S., 68; Cheney v. Bilby, 74 Fed., 52.

3. **TENDER. Payment.**

As a rule, it is sufficient if a debtor tenders payment of a note on the due date at the place of payment, even though the creditor be absent; the debtor not being required to follow the creditor. (*Post*, *p.* 109.)

Cases cited and distinguished: Southworth v. Smith, 7 Cush. (61 Mass.), 391; Hale v. Patton, 60 N. Y., 223.

4. **MORTGAGES. Payment. Sufficiency of tender.**

Where the maker of a note secured by a trust deed located the payee in another State, and informed him of his desire to pay the notes, which were then past due, and afterwards deposited funds in the bank used by the payee, there was

sufficient tender of payment to prevent the latter from maturing the entire indebtedness for nonpayment, and foreclosing the trust deed. (*Post*, *p.* 110.)

5. BILLS AND NOTES. Place of payment.

The making of notes payable "at any bank" in a city authorized the maker to require the holder of the notes to make his election at what bank he would receive payment, and on failure to elect, the maker could elect to make payment at a certain bank, and give notice of his election to the holder. (*Post*, *p.* 110.)

Cases cited and approved: Brickett v. Spaulding, 33 Vt., 109; Barrett v. Eller, 51 N. C., 550.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—F. H. HEISKELL, Chancellor. Part One, 10th Division.

HENRY CRAFT, for plaintiffs.

G. J. MCSPADDEN, for defendants.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint was filed to enjoin the defendants from foreclosing a trust deed; a demurrer was interposed by defendants and sustained by the chancellor; an appeal was granted, in the exercise of the

court's discretion, and the cause heard by the court of civil appeals, which affirmed the chancellor's decree. The cause is before this court for review on *certiorari.*

On August 1, 1907, defendant Embrey conveyed to Hal Mitchell, colored, a tract of land in the State of Arkansas for a consideration of $12,000, no part of which was paid in cash. Twelve $1,000 notes were executed by the vendee, all made payable "at any bank in Memphis," the first maturing December 15, 1907, and the others on the 15th of each succeeding December until the last was paid. Mitchell at the same time executed a trust deed conveying the land to defendants Bartons, as trustees, to secure the payment of these purchase money notes; and, taking possession, Mitchell paid the notes maturing December 15, 1907, and December 15, 1908, but failed to pay in full the December 15, 1909, note. At the date of the filing of the bill (November 18, 1912) $94.15 of that note remained unpaid, and the notes maturing in 1910 and 1911 were in default as to payment; the total amount thus due at that time being, approximately, $2,900.

The trust deed contained a provision that if default occurred in the payment of any of the notes, then all of the indebtedness, at the election of the holder of the notes, should become due for the purpose of foreclosing the lien of the trust deed.

On October 24, 1912, Mitchell conveyed the land to complainant Stansbury for $2,000 cash and the assumption by Stansbury of the payment of the indebtedness due and to fall due; and on the 31st of October Stans-

bury sought Embrey for the purpose of paying him the amount then past due on the series of notes. Finding that Embrey was absent from Memphis, on a visit to Virginia, he wired Embrey at his temporary address, giving information of his purchase of Mitchell, his desire to pay the past-due notes and stop interest, and asking authority for making payment to the Bartons, trustees. On November 1st Stansbury received a reply from Embrey: "I will be home about fifteen *proximo.*"

This reply not being satisfactory to Stansbury, he on the same day wrote Embrey a letter in which, after acknowledging receipt of the quoted telegram, he expressed his willingness to pay the amount referred to, to anyone in Memphis whom Embrey might name, or to send to Embrey in Virginia a certified check for same, and waiving a delivery of the paper until Embrey's return to Memphis. Not receiving a reply, on November 6th Stansbury went to the bank in Memphis where Embrey kept his bank account and deposited therein to Embrey's credit the full amount due on the then matured notes, and promptly notified, and had the bank to notify, Embrey of this fact.

Embrey had not up to this time exercised his option to declare the entire indebtedness due; but on November 9th he wrote Stansbury declining to accept the deposit, and saying that he was also notifying the bank. Complaining of Stansbury's trading with Mitchell without consultation with him (Embrey) he proceeded: "I, therefore, elect to declare the entire land debt due

November 15, 1912, and notify you that if not paid on or before that date I will advertise sale of the land under the trust deed.''

The rule was laid down in *Lee* v. *Bank,* 124 Tenn., 582, 139 S. W., 690, that in order to prevent the acceleration of the maturity of that part of a total indebtedness not matured at the time, a tender of the portion matured under the contract's terms is sufficient, if made after default but before the creditor has exercised his option to declare the entire indebtedness due.

The position taken by complainant Stansbury in the bill of complaint, and on appeal, is that Embrey was obligated, on notice to him of Stansbury's readiness to pay, to make some suitable arrangement by which the notes could be paid in Memphis, failure and refusal to do which entitled Stansbury to pay the money into bank under the place of payment clause embodied in the several notes, ''at any bank in Memphis.''

It is replied, on the part of Embrey, that the deposit in bank did not constitute a payment.

The rule of law is clearly to the effect that making a note payable at bank—any bank or a particular bank—does not avail to make the bank the agent of the owner of the note to receive payment; the note itself not being lodged by him with the bank. *Cheney* v. *Libby,* 134 U. S., 68, 10 Sup. Ct., 498, 33 L. Ed., 824, 825; *Ward* v. *Smith,* 7 Wall. (U. S.), 447, 19 L. Ed. 207; *Hills* v. *Place,* 48 N. Y., 520, 8 Am. Rep., 568; *Adams* v. *Hackensack,* 44 N. J. Law, 638, 43 Am. Rep., 406; 7 Cyc. 1035. The principle is the same as that announced in our re-

cent case of *Griswold* v. *Davis*, 125 Tenn., 229, 141 S. W., 205.

It is then insisted by defendant Embrey that, since the deposit did not constitute a payment, it also failed of being a tender, that a tender cannot be made to a person who is not authorized to receive payment, and that payment and tender hang by the same thread, so that when one falls the other falls. In this there is a failure to distinguish. The making of a note payable at a named bank entitles the maker to resort to that bank to tender payment; and if the note be not there, the tender avails, nevertheless, to arrest the running of interest, to save a right or to prevent a forfeiture. *Cheney* v. *Libby*, supra; *Cheney* v. *Bilby*, 74 Fed., 52, 20 C. C. A., 291; 22 Cyc., 1555; 38 Cyc., 151, 152.

But it is argued in behalf of Stansbury that this rule as to tender only has application on a note's due date, and that in the present case all three of the notes in default had been so for long periods, that there rested no duty on the holder to keep them in bank or have them there on the date when it happened to suit the debtor to tender payment, and that a tender thus long after default should not be held to be of binding force on the creditor, who in this instance was absent from the State (carrying the notes with him), without any purpose to evade or defeat tender to him in person.

This case must turn, in our opinion, on the effect of Embrey's absence and the duty resting on him to leave, or provide on request of the debtor a place for payment.

The general rule is that if a creditor is thus absent, and the debtor does all in his power to make a tender on the due date, the creditor cannot afterwards object that no tender was made. The debtor is not required to follow the creditor out of the State there to make tender. 28 Am. & Eng. Ency. Law (2 Ed.), 10, 23; 22 Cyc., 1554.

In *Southworth* v. *Smith,* 7 Cush. (61 Mass.), 391, it was held that if A., the purchaser of real estate at a sale on execution, when B., a purchaser of the debtor's right to redeem, attempts to make a tender of the money due, is absent from home by necessity and without any intention to evade a tender, and in consequence of such absence, and by the use of due diligence, B. is unable to find A., or any person authorized to act in his behalf, and is therefore prevented from making the tender seasonably, no forfeiture of the estate is thereby incurred, provided B. was prepared to make tender, and that it was not necessary that B. should leave the money where A. could control it.

In *Halc* v. *Patton,* 60 N. Y., 233, 19 Am. Rep., 168, a case involving the acceleration of mortgage notes, it was held that where, by the terms of a contract the principal becomes due at the option of the obligee, in case the interest remains unpaid for thirty days, in case no place of payment is specified, if the obligee is absent from the State at the termination of the thirty days, the debtor is not obliged to follow him, but readiness to pay within the State in that case will be as effectual as actual payment to save from acceleration.

It is urged, however, that these two cases are to be distinguished from the one at bar by the fact that in each the tender was, it is claimed, before a default had been made, while here it followed default. But in *Southworth* v. *Smith* the effort to tender was within a period of redemption allowed by law, following a default, and in *Hale* v. *Patton,* the tender was within a contract period of grace following default. Here the right to be preserved was one allowed so to be by law at any time before exercise by the holder of his option to accelerate.

When Stansbury located Embrey in Virginia, acquainted him with his desire to pay the past-due notes, and requested that a mode of payment be suggested or provided, he did all that any rule of law could reasonably require of him. After that his deposit of the funds in the bank used as depository by Embrey should operate to defeat the after attempt of Embrey to declare the entire indebtedness mature and to foreclose the trust deed.

The notes were made payable at "any bank in Memphis," which provision, it seems, gave the debtor or maker the right, for tender and payment purposes, to call on the holder of the notes to make his election at what bank he would receive payment, or else, on failure, to make his (the debtor's) own election and give notice to the holder. *Brickett* v. *Spaulding,* 33 Vt., 109; *Barrett* v. *Eller,* 51 N. C., 550.

When Embrey declined to name any other place or person to receive the proffered payment, we hold that

the tender was properly made to the bank, and that thereafter there was no right in Embrey to declare the entire debt mature. We consider that the rule thus declared best comports with the convenience and safety of business men, to whom when diligent the law should point a mode of warding off foreclosures by debt-payment.

The writ of *certiorari* granted; decree of the court of civil appeals affirmed.

SMITH *v.* DIXIE PARK & AMUSEMENT CO.

(*Jackson.* April Term, 1913.)

1. **RELEASE. Joint tort-feasors. Statutes.**

Shannon's Code, sec. 5570, providing that all releases, whether of a debt of record, or a contract under seal, or otherwise, shall have effect according to the intention of the parties, is confined to actions *ex contractu* only, and does not change the common law rule governing the release of one joint tort-feasor. (*Post*, *p.* 116.)

Cases cited and approved: Snyder v. Witt, 99 Tenn., 622; Brown v. Kencheloe, 3 Cold., 192.

Code cited and construed: Secs. 5570 (S.).

2. **RELEASE. Joint tort-feasors. "Covenant not to sue" one joint wrongdoer. Effect.**

An instrument executed by a person sustaining a personal injury inflicted by joint wrongdoers, whereby he agrees to dismiss the suit against one of them, and not to reinstitute it, and whereby he agrees to hold him harmless from all liability by reason of the accident, is a "covenant not to sue," and is not a satisfaction of the liability of the other wrongdoer, and judgment may be recovered against him. (*Post*, *p.* 117.)

Cases cited and approved: Bloss v. Plymale, 3 W. Va., 393; Ellis v. Esson, 50 Wis., 138; Gilbert v. Finch, 173 N. Y., 455; Louisville, etc., Co. v. Barnes, 117 Ky., 860; Carey v. Bilby, 129 Fed., 203; Chicago, etc., R. Co. v. Averill, 224 Ill., 516; Chamberlain v. Murphy, 41 Vt., 110; Robertson v. Trammell, 98 Tex., 364; Mathewson v. O'Kane, supra.

Cases cited and disapproved: Ellis v. Bitzer, 2 Ohio, 89; Seither v. Philadelphia Traction Co., 125 Pa., 397; O'Shea v. V. Y. C., etc., R. Co., 105 Fed., 559; Abb v. Nor. Pac. R. Co., 28 Wash., 428; McBride v. Scott, 132 Mich., 176; Ducey v. Patterson, 37 Colo., 216; Musolf v. Duluth Elec. Co., 108 Minn., 369.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—FRANK FENTRESS, Chancellor. Part Two, 10th Division.

T. F. KELLY, for complainant.

GEORGE E. NEUHARDT and CHARLES W. ANDERSON, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This suit was brought originally against the Dixie Park & Amusement Company, and later on the Memphis Consolidated Gas & Electric Company was brought before the court as a defendant. Both defendants were declared against as liable for personal injuries suffered by plaintiff, Smith, it being alleged that the first-named defendant operated an amusement park in Memphis, electric current for lights, machinery, etc., for which was supplied by the other defendant; that the defendants had placed two electric wires on top of a fence, five feet high, inclosing the park, which wires were naked and charged with a dangerous current of electricity, so supplied; that, while walking along a street on the line of which the fence and wires were

strung, plaintiff had occasion to stop to wait for a friend, and unconsciously laid his hand on the top of the fence and received a shock from the current. Damages were laid at $10,000, as against the defendants as joint tort-feasors.

Before the cause was reached for trial, the Gas & Electric Company entered into contract with plaintiff quoted below, and the cause thereafter proceeded against the original defendant alone, which pleaded the contract as an accord and satisfaction. The plaintiff filed a replication, denying that he had received full satisfaction, or had discharged the damages. On the coming in of plaintiff's testimony, the pleading defendant made a motion (which was granted) for peremptory instructions to the jury to return a verdict of nonliability, based upon the effectiveness of the contract as an accord and satisfaction.

After reciting by way of preamble, in substance, the bringing of the suit as above outlined, plaintiff's doubt, on advice of counsel, of his right to a recovery against the Gas & Electric Company, but of confidence in his right to a recovery against the Park & Amusement Company of "a verdict far in excess of the amount hereinafter set out," and plaintiff's "desire to settle and adjust any claim plaintiff might have against the Gas & Electric Company by reason of said injuries," the contract provided:

"Therefore, for and in consideration of the sum of four hundred dollars paid to me by the said Memphis Consolidated Gas & Electric Company, the receipt of

which is hereby acknowledged, I expressly agree and covenant with the said Gas & Electric Company to dismiss and not further prosecute my suit now pending against it in the circuit court of Shelby county, and I further agree, for myself, my heirs, and personal representatives, not to reinstitute said suit or prosecute any other suit against said Gas & Electric Company, by reason of the injuries above referred to, that have already or may hereafter develop by reason of said accident, and I agree to hold harmless said Gas & Electric Company for any and all claims or liabilities against it by reason of said accident.

"This agreement, however, is not entered into or intended by me as a release of any claim or actions that I might have against the said Dixie Park & Amusement Company, by reason of the matters above set forth; nor is it an agreement to dismiss my suit now pending against said Dixie Park & Amusement Company, and it is expressly agreed and understood that this agreement is not in any wise to inure to the benefit of the Dixie Park & Amusement Company.

"It is clearly understood that this instrument is merely a covenant not to sue said Gas & Electric Company, and not a release of first party's damages against the real person liable, the Dixie Park & Amusement Company."

Judgment was entered in favor of the Park & Amusement Company in the circuit court, appeal was prayed to the court of civil appeals, which court reversed said judgment, and the cause was brought into

this court by petition for *certiorari* to review the ruling of the last-named court.

The single error assigned is the refusal of that court to sustain the plea of accord and satisfaction, alleged to have been proven by the contract quoted; but under this error several phases of the law respecting the release of a joint tort-feasor have been debated.

The first contention of plaintiff, Smith, is that section 5570 of Shannon's Code, properly construed in relation to and in connection with the contract, works a change of the rule of the common law that the release of one joint tort-feasor releases another tort-feasor. This section reads: "Sec. 5570. All receipts, releases, and discharges in writing, whether of a debt of record or a contract under seal, or otherwise, shall have effect according to the intention of the parties thereto."

It is argued that torts as well as contracts fall within the purview of this section, and that, since the contract above affirmatively shows an intention not to release the Park & Amusement Company, it should be given the intended effect—this, if the instrument be construed to be a release proper.

This section of the Code has never been construed by this court to have reference to actions *ex delicto;* on the contrary, it has been confined as having relation to actions *ex contractu* only.

In *Snyder* v. *Witt,* 99 Tenn., 622, 42 S. W., 442, the case of *Brown* v. *Kencheloe,* 3 Cold., 192, is cited as holding that in such a case a discharge of all tort-feasors results, whether the parties intended it so or

not; and the court proceeded to say: "The like rule, however, does not apply to contracts, where it is intended that the release of one jointly bound shall not operate to release another co-obligor. Shannon's Code, sec. 5570."

The next insistence of plaintiff is that, in view of the fact that the instrument under consideration does not purport to satisfy his full injury, but the contrary, and stipulates a reservation of the right to sue the Park & Amusement Company, it cannot be effective to release that company.

Reservations of this character are not infrequently inserted in releases, and consideration of their effect has given rise to different rulings on the part of the courts of this country; the conflict being sharp and far from even an approach to settlement.

A number of courts hold that a release which shows that it is not intended to evidence a settlement of the plaintiff's entire demand based on a tort, but reserves the right to pursue one or more of the joint wrong-doers for the balance, is not to be treated as a release of all, but as a covenant not to sue, with result of non-release of such other or others. *Bloss* v. *Plymale,* 3 W. Va., 393, 100 Am. Dec., 752; *Ellis* v. *Esson,* 50 Wis., 138, 6 N. W., 518, 36 Am. Rep., 830; *Gilbert* v. *Finch,* 173 N. Y., 455, 66 N. E., 133, 61 L. R. A., 807, 93 Am. St. Rep., 623; *Louisville, etc., Co.* v. *Barnes,* 117 Ky., 860, 79 S. W., 261, 64 L. R. A., 574, 111 Am. St. Rep., 281; *Carey* v. *Bilby,* 129 Fed., 203, 63 C. C. A., 361; *Chicago, etc.,*

R. Co. v. *Averill*, 224 Ill., 516, 79 N. E., 654, and earlier cases therein cited.

The reasons advanced in support of these decisions are that the rule gives effect to the intention of the parties executing the instrument, without violating any rule of morals or public policy, and that it tends to encourage compromises, which the law favors.

The cases holding to the contrary are numerous, and are believed to give the weight of authority to the maintenance of the rule that such a release will not, nothing else appearing, be deemed a mere covenant not to sue. *Ellis* v. *Bitzer*, 2 Ohio, 89, 15 Am. Dec., 534; *Seither* v. *Philadelphia Traction Co.*, 125 Pa., 397, 17 Atl., 338, 4 L. R. A., 54, 11 Am. St. Rep., 905; *O'Shea* v. *N. Y. C., etc., R. Co.*, 105 Fed., 559, 44 C. C. A., 601; *Abb* v. *Nor. Pac. R. Co.*, 28 Wash., 428, 68 Pac. 954, 58 L. R. A., 295, 92 Am. St. Rep., 368; *McBride* v. *Scott*, 132 Mich., 176, 93 N. W., 243, 61 L. R. A., 445, 102 Am. St. Rep., 416, 1 Ann. Cas., 61; *Ducey* v. *Patterson*, 37 Colo., 216, 86 Pac., 109, 9 L. R. A. (N. S.), 1066, 119 Am. St. Rep., 284, 11 Ann. Cas., 393; and, on this point, *Musolf* v. *Duluth Elec. Co.*, 108 Minn., 369, 122 N. W., 499, 24 L. R. A. (N. S.), 451.

While we have no reported case that rules the exact point, it would seem that the decision in *Brown* v. *Kencheloe*, supra, tends to align this court with the last line of authorities. Several of them cite that case, and quote its reasoning in support of their own respective holdings on the subject. Thus, in *McBride* v. *Scott*, supra, it was said: "We are of the opinion that

the better rule is that contended for by defendants in this case, that to admit of a settlement with one tort-feasor under such circumstances as are here presented, and to hold that a reservation such as is here attempted saves the right as to other tort-feasors, would open the door for the plaintiff in any case to acquire by successive settlements more than just compensation; or, as is said in *Brown* v. *Kencheloe,* 3 Cold., 192: 'The plaintiff in many instances would operate upon the fears of the defendants, and get from each full damages for the trespass committed.' "

Another reason occurs to us as not lacking substance: The authorities which declare such a release to be a covenant not to sue also hold that the amount received from the wrongdoer dealt with is to be credited *pro tanto* in favor of the other in event of recovery. Now, it is easily conceivable that in instances this right of credit would be forfeited by the defendant yet held to respond, rather than claimed by him by way of plea and proof, since he would prefer to lose any advantage that might be incident to the credit rather than to disclose to the trial jury the fact that another charged to have been his joint wrongdoer had purchased his peace, and, in so far, may be thought to have confessed liability. The case at bar may be said to present this phase in a practical way—a claimed liability of $10,000, and a potential credit sum, under the rule referred to, of $400. If counsel of the pursued defendant should consider it wiser to forego pleading the accord and satisfaction *pro tanto* for the indicated

reason, the plaintiff thereby would become the beneficiary of the pursued's fears.

If the contract in proof may be treated as a release, it seems that under the principles of the common law it operated to release the Park & Amusement Company. 1 Cooley on Torts (3 Ed.), 161. The cause of action was indivisible; the tort a thing integral. There could be no separate estimate of the injury done by each of the wrongdoers, with accordant recoveries.

As seen above, our Code provision did not change this rule of the common law touching releases of joint tort-feasors. It did change the rule in respect of releases of joint obligors. A strong inference arises that the legislative intent was that the common law rule, as understood and administered at the time, in regard to releases of causes of action sounding in tort, should remain unchanged.

What has so far been said is on the basis of an assumption that the instrument pleaded is a release. It is argued for plaintiff, however, that it is not a release, but that by fair, if not necessary, intendment it is a covenant not to sue.

Releases of, and covenants not to sue, a wrongdoer have from early times been considered distinct. A covenant not to sue one of several joint obligors or joint tort-feasors did not at common law operate to discharge others from liability, since it was said not to have the effect, technically, of extinguishing any part of the cause of action. 34 Cyc., 1090; *Snow* v. *Chandler*, 10 N. H., 92, 34 Am. Dec., 140; *Chicago, etc., R. Co.* v.

Averill, supra; *Musolf* v. *Duluth Elec. Co.,* supra; *Matheson* v. *O'Kane,* 211 Mass., 91, 97 N. E., 638, 39 L. R. A. (N. S.), 475, 27 Ann. Cas., 267, and notes.

The last two cases demonstrate that the confusion in the cases relating to such agreements arises out of the construction of the particular writing as a release or as a covenant not to sue rather than in respect of the existence of the distinction between them, at common law or in modern practice.

Indicia of a covenant not to sue may be said to be: No intention on the part of the injured person to give a discharge of the cause of action, or any part thereof, but merely to treat in respect of not suing thereon (and this seems to be the prime differentiating attribute); full compensation for his injuries not received, but only partial satisfaction; and a reservation of the right to sue the other wrongdoer.

Looking to the instrument here involved, the only provision that tends to give it the color of a release is the one stipulating plaintiff's agreement "to hold harmless said Gas & Electric Company for any and all claims or liabilities against it by reason of said accident."

The Texas courts had under review an agreement claimed to be a release, in *Robertson* v. *Trammell,* 98 Tex., 364, 83 S. W., 1098 (denying writ of error to 37 Tex. Civ. App., 53, 83 S. W., 258), and held that where, pending suit against two tort-feasors, plaintiff, in consideration of a certain sum, contracted not to sue one of them, the fact that plaintiff executed a bond to such

defendant to indemnify it against all claims by reason of the cause of action alleged did not change the character of the transaction from a covenant not to sue to a release discharging the other joint tort-feasor.

The fact that suit had been brought against the two alleged wrongdoers at the time the agreement was entered into does not operate to convert it into a release. *Chamberlain* v. *Murphy*, 41 Vt., 110; *Robertson* v. *Trammell*, supra; *Matheson* v. *O'Kane*, supra.

We, therefore, are of opinion that the instrument relied on, being a covenant not to sue, was not a satisfaction of the liability, if any, of the Park Amusement Company. Writ of *certiorari* accordingly denied.

DEEN *et al.* v. CRENSHAW, *County Court Clerk.*

(*Jackson.* April Term, 1913.)

1. **TAXATION. Inheritance tax. Appraisement and judgment.** Under Acts 1893, ch. 174, sec. 12, providing that any interested person, not satisfied with an appraisement of property subject to an inheritance tax, shall have the right to file exceptions thereto in writing, on giving security to pay all costs, together with whatever tax shall be fixed by the county court, and thereupon to have the county court hear such exceptions, that the county court shall have jurisdiction to determine all questions of valuation and of the liability of the appraised estate for such tax, subject to the right of appeal, and that if an appeal is prosecuted to the circuit court the cause shall be heard *de novo*, the county and circuit courts have power to render a judgment for the amount of the tax and costs; their power not being limited to passing on the correctness of the valuations contained in the appraiser's report, the proceeding amounting to a suit regularly instituted, notwithstanding section 14, expressly providing for a suit to enforce the tax lien on realty at the end of one year after the decedent's death, and section 15, providing for a suit commenced by notice or bill where any tax has not been paid according to law. (*Post, pp.* 128-130.)

Acts cited and construed: Acts 1893, ch. 174.

2. **TAXATION. Inheritance tax. Collection. Attorney's fees.** Under Acts 1893, ch. 174, sec. 12, providing that any interested person, not satisfied with the appraisement of property subject to an inheritance tax, shall have the right to file exceptions thereto, on giving security to pay all costs, together with whatever tax shall be fixed by the county court, whereupon such court shall have jurisdiction of the matter, subject to the right of appeal to the circuit court, section 14, relative to actions to enforce a tax lien on realty, which provides that,

if the court adjudges the tax to be due and a charge upon the real estate, it shall tax up as a part of the costs a reasonable attorney's fee for the clerk's attorney, and section 16, providing that clerks of county courts shall be the agents of the state for the collection of such tax, that it shall be their duty when necessary to employ an attorney, and that the fees of such attorney shall be taxed up by the court as costs against the delinquent, if he shall be held liable, it was proper for the county court, on the hearing of exceptions to the appraisement, which were overruled, to tax a reasonable attorney's fee for the clerk's attorney as a part of the costs. (*Post*, pp. 131, 132.)

Cases cited and approved: Harrison v. Johnston, 109 Tenn., 245, 262, 266, 267; Shelton v. Campbell, 109 Tenn., 690.

3. TAXATION. Inheritance tax. Collection. Attorney's fees.

On appeal in a proceeding for the collection of an inheritance tax, in which the county court taxed an attorney's fee for the attorney of the clerk of the county court, the supreme court could make such reduction in the fee allowed as would bring it down to a reasonable amount, and commensurate with the work done and the responsibility assumed. (*Post*, *pp.* 131, 132.)

4. TAXATION. Inheritance tax. Collection. Witness fees.

In an inheritance tax proceeding, the county court had power to allow special compensation to an expert witness, who testified as to the value of real estate. (*Post*, *p.* 133.)

5. APPEAL AND ERROR. Record. Questions presented for review. Expert witness. Fees.

In an inheritance tax proceeding, an allowance of $30 to an expert witness on the value of real estate could not be held erroneous, where the facts upon which the trial court acted were not before the supreme court. (*Post*, *p.* 133.)

6. TAXATION. Inheritance tax. Collection. Costs.

Where, on the hearing of exceptions to the appraisement of real property subject to an inheritance tax, by agreement of the

parties the valuation was reduced to the amount received on a sale subsequent to the appraisement, but not to the valuation insisted on in the exceptions, and the county court thereupon overruled the exceptions, the reduction by agreement, based on a fact transpiring after the taking of the appeal to the county court, did not make the heirs the successful parties on the appeal, and hence costs were properly taxed against them. (*Post*, *p.* 133.)

7. COSTS. On appeal. Collection of inheritance tax.

In a proceeding to appraise property subject to an inheritance tax against the heirs and administrator of a decedent, the county court rendered judgment against the heirs for the amount of the tax on the real estate, and against the administrator for a tax on certain personal property. On an appeal by the heirs alone, the circuit court sustained their exception only to the tax against the personal property. *Held*, that the only contest between the heirs and the State was in respect to the tax on the real estate, and, having lost this contest, they were properly taxable with the costs, notwithstanding the sustaining of the exception as to the tax against the administrator. (*Post*, *p.* 133.)

8. APPEAL AND ERROR. Review. Questions not raised below.

In a proceeding to collect an inheritance tax, where no objection that the tax was not then due was made in the circuit court, the immaturity of the action was waived, and could not be urged on appeal. (*Post*, *p.* 134.)

Acts cited and construed: Acts 1893, ch. 174, sec. 4.

9. TAXATION. Inheritance tax. Time for collection.

Acts 1893, ch. 174, sec. 4, provides that, if an inheritance tax is paid within three months after the death of the deceased, a discount of five per cent. shall be allowed, and if not paid at the end of one year from the death of a decedent, "at which time it shall be due," interest shall be charged. Section 8 makes it the duty of persons to whom real estate descends to notify the clerk of the county court immediately upon

the vesting of the estate. Section 14 requires that, when any such tax on real estate shall have remained due and unpaid for one year, the clerk of the county court shall proceed by bill or petition to enforce the lien, and also provides that, if the clerk knows of any good and sufficient reason why payment of the tax has been delayed, he shall not be compelled to file the bill immediately upon the tax becoming due, but in his discretion may postpone the bringing of such suits to such times as he deems proper within the limits of the act. Section 3 requires the owner of personal estate subject to the tax to make a full report and return to the clerk within one year, and within that time to enter into security for its payment, and provides that in case of failure so to do the tax shall be immediately payable and collectible. Section 5 provides for the deduction of the amount of the tax by executors or administrators from legacies or distributive shares, and provides that every sum of money retained by any executor or administrator, or paid into his hands on account of any legacy or distributive share for the use of the State, shall be paid by him without delay to the county clerk. *Held*, that the tax is due at the death of the decedent, the expression "at which time," in section 4, referring to the date of death, and hence, although the clerk of the county court might wait one year before proceeding to collect the tax, he was not bound to do so, and a judgment in a proceeding to collect the tax commenced within one year was not erroneous, although execution thereon should have been stayed until the expiration of one year. (*Post*, *p.* 135.)

FROM SHELBY.

Appeal from Circuit Court, Shelby County. J. P. YOUNG, Judge.

SWEENEY & SWEENEY, for appellant Deen.

GILMER P. SMITH, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

This proceeding was instituted in the county court of Shelby county, by the clerk of that court, pursuant to chapter 174, Acts 1893, to collect a collateral inheritance tax on the estate of Hannah Jane Hall, who had died intestate in the county on the 16th day of March, 1912.

The method pursued was this: On the 17th day of March, the clerk of the county court, in compliance with section 12 of the act, appointed an appraiser to make a valuation of the estate for the purposes of the tax. On the 8th of October the appraiser filed his report; on the 10th of October the parties claiming succession to the real estate filed exceptions to the valuations fixed. The same parties excepted to the inclusion of certain diamonds in the appraisement, because this property was claimed by others, under an alleged nuncupative will, and its ownership was in litigation between the administrator and the persons claiming under the will. The county court overruled all of the exceptions, confirmed the report, and rendered judgment against the claimants of the estate, the present plaintiffs in error, for the amount of the tax fixed by the statute (except for the tax on the diamonds, which was against the administrator, also a party), and also rendered judgment in favor of the clerk for the costs of the cause, including a fee of $30 to H. A. Roynon, introduced as an expert witness on the value of the

real estate, and for a fee to the clerk's attorney, the latter amounting to fifteen per cent. of the total tax.

The plaintiff in error appealed to the circuit court of the county, where the case was tried *de novo*. In that court the tax claimed on the diamonds was disposed of as hereinafter stated. An agreement was made between the parties as to the valuation of two pieces of the real estate, based on a sale made by the heirs after the appraisement. This valuation was lower than that fixed in the appraisement, but higher than the one insisted on in the exceptions. The exception on this subject was therefore overruled, and likewise, all other exceptions. The circuit court thereupon rendered judgment against plaintiffs in error for the amount of the tax on the real estate under the valuations so modified, and also for the costs, including the Roynon expert witness fee, and also the attorney's fee of the clerk's attorney. From this judgment, plaintiffs in error prosecuted an appeal to this court.

The first question which we shall consider arises on the contention that neither the county court nor the circuit court had any power to render judgment for the amount of the tax and the costs, but that, under the form of the proceedings instituted, the only power conferred by law was to pass on the correctness of the valuations contained in the report. Is this contention sound? The answer depends upon a proper construction of sections 12, 14, and 16 of the act.

The statute, after providing for the appraisement, continues, in section 12: And "any interested person

not satisfied with said appraisement shall have the right at any time within thirty days after such appraisement is filed with the clerk, *to file exceptions thereto, in writing, on giving security to pay all costs, together with whatever tax shall be fixed by the county court, and thereupon to have the county court to hear said exceptions; and, upon such exceptions being filed, the county court shall have jurisdiction to determine all questions of valuation and of the liability of the appraised estate for such tax, subject to the right of appeal to the circuit court* (or court of like jurisdiction), *as in other cases. If an appeal should be prosecuted to the circuit court such cause shall be heard de novo.*"

We have italicized the latter half of this section for convenience of reference. It is perceived from this language that the excepting party must give bond for costs, *and for the tax,* as a condition of his litigating the amount of the tax, and obtaining the judgment of the court thereon; that upon this bond being executed, and exceptions filed, the county court shall proceed to hear the questions raised by the exceptions on the amount of the valuations contained in the report of the appraisement, *and also the liability of the appraised estate for the tax claimed* by the State. The act does not provide in terms that a judgment shall be entered embodying the results reached; but this is necessarily to be implied from the fact that the questions mentioned are to be determined, as well as that there are provisions in respect of an appeal to the circuit court, and

a trial *de novo* there. There can be no appeal unless there be a judgment in existence to appeal from. If it was intended that the judgment should cover only the ascertainment of the true valuation, there was no good reason for requiring a bond to cover the amount of the tax. A bond being required in the cause to secure this tax, and the amount of the tax being ascertained in the same cause, the legislature could not have intended that the State should be relegated to an independent suit to recover judgment on the bond. It cannot be denied that judgment must be entered on this bond for the costs. Why should a supplemental action be required on the same bond for the tax?

We conclude, therefore, that by the method indicated a suit was, under the authority of the act, regularly instituted and conducted to its orderly termination, and that plaintiffs in error's adverse contention is not well founded. The legislature might have required more elaborate pleadings; but it had the power to prescribe the practice indicated. The act does, in section 14, contain express provisions for a suit to enforce the tax lien on realty at the end of one year from the death of the decedent. Those provisions, however, are not in conflict with a proceeding of the kind we have before us commenced within the year, in which the necessity for the enforcement of the lien is forstalled by the bond required to secure the payment of the tax. There is no want of harmony in the system, occasioned by these several provisions. The two forms of suit arise under different circumstances, each

to serve a useful purpose. In an action of the kind we have in hand, the suit is brought to fix the true valuation of the property subject to the tax, and as a necessary consequence the amount of the tax, and incidentally to collect it. The suit to enforce the lien presupposes that all preliminary matters have been ascertained, that the appraisement has been made, and has been agreed to, because not complained of within the time and in the manner required by law, therefore that the amount of the tax has been ascertained by simple calculation in the office of the clerk, leaving nothing to be done except the enforcement of the lien after the expiration of one year from the death. There is also another form of suit, which may be commenced by notice issued by the county court clerk, or by bill in the county court, at the option of the clerk, as prescribed in section 15. A suit of the kind we now have before us is not at all out of harmony with the kind of action provided for in section 15, as will be readily perceived upon even a casual inspection of the language there used.

The next contention is that attorney's fees were improperly allowed as part of the costs; also that, in any event, 15 per cent. was exorbitant.

We have seen that under section 12 bond must be given for the payment of costs. Sections 14 and 16, which must be construed together, and with section 12, include within the term "costs" a reasonable fee for the clerk's attorney. Under section 16, the suit runs in the name of the county clerk, and it is made

his duty to employ an attorney whenever necessary; and in this connection it is further provided that if the State lose its suit, or the amount cannot be collected from the judgment debtor, the State is to be taxed with a reasonable attorney's fee, unless the suit brought by the clerk be frivolous or malicious, in which event the fee must be paid by himself. Section 14 not only provides for a fee for the clerk's attorney, to be taxed as costs for service in the county court, but also that on appeal a fee shall be taxed up as costs in the appellate courts, in favor of the State's attorney upon whom the duty of conducting the case in those courts is devolved—such latter fee, when collected, to be covered into the treasury of the State. *Harrison* v. *Johnston,* 109 Tenn., 245, 262, 266, 267, 70 S. W., 414. See, also, *Shelton* v. *Campbell,* 109 Tenn., 690, 72 S. W., 112.

As to the amount of the fee, after a careful examination of the record, showing the nature, character, and extent of the work performed by the attorney for the clerk, we think he would be amply compensated by an allowance equal to seven and one-half per cent. of the amount of the tax adjudged, and the judgment of the trial court will be corrected accordingly. It is always within the power of the court to make such reductions, in this class of cases, as will bring the fee down to a reasonable amount, one commensurate with the work done and the responsibility assumed.

As to Roynon's witness fee, there is no evidence in the record on which we can base any correction of

the action of the trial judge in respect of this matter. It is recognized in our cases that special compensation may sometimes be allowed for expert witnesses. We cannot say that the trial judge was in error in allowing the amount he did, without facts before us showing such error.

Plaintiffs in error insist they should not have been taxed with the costs at all, since, as they claim, they were the successful parties in the county court. They resisted the tax on the ground that the valuation of the property was too high. The only reduction they secured in the circuit court, on the real estate, was by agreement of parties based on a fact which transpired after the appeal to that court, a sale by them of part of the property, and this, too, as already said, at a figure higher than the valuation they put upon it in their exception. A claim of victory could not be justly based on this fact.

This leaves only the question arising on the inclusion of the diamonds in the appraisement. Stating the facts a little more at large upon this subject than previously, they are as follows: Hannah Jane Hall owned some diamonds, which were appraised at $1,000. After her death the North Memphis Savings Bank was appointed administrator. One Bridget Donohue claimed that Mrs. Hall gave her these diamonds. There is now a replevin suit pending between her and the administrator for the possession of the diamonds. The county court, as we construe its judgment, held the administrator liable for the tax on this part of the

property, and not appellant. The appeal was by the plaintiffs in error, and not by the administrator. On this state of facts the circuit judge simply held that as the ownership of the diamonds was in dispute, and there was no claim against plaintiffs in error in respect thereof, he would sustain their exceptions on this subject. These facts are not sufficient to show that plaintiffs in error were the successful parties in the sense of the statute applicable to the taxation of costs, so as to cast the costs on the State. The only contest the plaintiffs in error had with the State was in respect of the amount of the tax on the real estate descended to them. In this contest, as we have seen, they lost.

It is insisted that the judgment could not be properly rendered because the tax was not due when the suit was instituted, or even when the judgment was rendered in the circuit court. No objection of this kind was made in the circuit court, and hence the immaturity of the action, if it existed, was waived, and could not be urged here. However, the state of the law upon the question of the date of the accrual of the tax is this: Section 4 of the act provides: "If the collateral of the inheritance tax shall be paid within three months after the death of the decedent, a discount of 5 per cent. on the amount of the tax shall be made and allowed; and if said tax is not paid at the end of one year from the death of a decedent, at which time it shall be due, interest shall then be charged at the rate of six per centum per annum on such tax." The ex-

pression "at which time" refers to the date of the death of the decedent as the point of time which marks the maturity of the tax debt; but an indulgence of one year is given before interest can be charged, and a bonus of 5 per centum is offered for a voluntary payment within three months. Moreover, it is not made obligatory on the clerk to proceed in the collection until after the expiration of one year. This construction is supported by other parts of the act. Under section 8, it is made the duty of owners of real estate descended to notify the clerk immediately upon the vesting of the estate. Under section 14, it is made the duty of the county clerk, "whenever any such tax on real estate shall have remained due and unpaid for one year," to proceed by bill or petition in the county court to enforce the lien for the payment of the tax. In the same section, it is further provided: "If said clerk knows of any good and sufficient reason why the payment of such tax has been delayed, he shall not be compelled to file such bill immediately upon said tax becoming due, but may, in his discretion, postpone the bringing of such suit to such time as he deems proper, within the limits of this act." By section 3, last sentence, the same indulgence is given in respect of the tax on personal property; but under section 5, through the action of an executor, or administrator, the collection may be made within the year, or in the case of specific personal property the failure to give bond for the tax under section 3 will result in the necessity of the clerk's making immediate

collection. Therefore, under a true construction of section 4, while the clerk might have given indulgence until the expiration of one year from the death of Hannah Jane Hall, he was not bound to do so. Moreover, as we have already seen, the filing of the exceptions, accompanied by the filing of the bond for the purpose of contesting the appraisement and to secure the payment of the tax, was the beginning of a litigation which in ordinary course would eventuate in a judgment for the tax, or its voluntary payment; but no interest could be charged until the expiration of the year. From this it is apparent that the trial judge, although properly entering judgment in due course, should have stayed execution until the expiration of one year from the death of Mrs. Hall; no reason having been shown by affidavit, under the Code, for an earlier issuance. No practical injury, however, has been suffered by plaintiffs in error, since the year had fully expired without the issuance of an execution when the cause was tried here.

It results that, after making the modification as to the attorney's fee above directed, the judgment must in all other respects be affirmed.

J. T. Fargason Co. *v.* Ball *et al.*

(*Jackson.* April Term, 1913.)

1. **FACTORS. "Conversion" by factor. Assertion of ownership.**

Though as a general rule any assertion of dominion over the personal property of another against his will is a conversion, and the defendant cannot justify by showing that he had no notice of complainant's rights, yet, where a cotton factor received cotton for sale in good faith, and paid over the proceeds to the person purporting to be the true owner before notice of the owner's rights, and had neither property nor proceeds in his possession when demand was made by the owner, he could not be said to have knowingly or conscientiously asserted any claim to the property or its proceeds against the owner, and there was consequently no "conversion." (*Post*, *p.* 139.)

Cases cited and approved: Taylor v. Pope, 45 Tenn., 413; Frizzell v. Rundle, 88 Tenn., 396; Bank v. Hill, Fontaine & Co., 99 Tenn., 42; Embry v. Galbreath, 110 Tenn., 297; Hughes v. Alston, 105 Tenn., 70.

Cases cited and disapproved: Roach v. Turk, 56 Tenn., 708.

2. **COURTS. Previous decisions.**

It is almost as important that the law should be certain as that it should be sound; hence, though sometimes the duty is imperative to overrule a former decision, the power should be sparingly exercised. (*Post*, *pp.* 141, 142.)

3. **CHATTEL MORTGAGES. Foreign mortgage.**

Though a mortgagee of property under a foreign mortgage, duly recorded and valid in the foreign jurisdiction, can recover the property from a purchaser without knowlege in this State, yet, where cotton covered by a mortgage duly recorded in a foreign State was consigned, without the knowledge or consent of the mortgagee, to a cotton factor in this State, the mortgagee

could not recover from the factor, after he had in good faith sold the property and turned over the proceeds to his principal, since the contest was not over the property or proceeds. (*Post*, *p.* 142.)

Case cited and approved: Frizzel v. Rundle, 88 Tenn., 413.

Case cited and disapproved: Newsum v. Hoffman, 124 Tenn., 369.

FROM SHELBY.

Appeal from Chancery Court, Shelby County.—F. H. HEISKELL, Chancellor.

W. P. ARMSTRONG, ST. JOHN WADDELL, and PERCY & HUGHES, for appellant.

PERCY FINLAY, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The bill in the present case was brought to recover the value of seventy bales of cotton alleged to have been wrongfully converted by the defendants. The defense interposed was that W. M. Ball & Co. were cotton factors in the city of Memphis, that the cotton was shipped to them by one W. H. Barnes in his own name, was received by them in the regular course of their business for sale, was sold by them in the usual way, and the proceeds paid over in good faith to Barnes, their principal, all before they had any notice of complainant's interest in the cotton. The evidence established

the facts so relied on, unless the defense of the want of notice be disproved by the fact that the rights of complainant were represented by a mortgage made by the owner of the cotton, in the State of Arkansas, and recorded there, in the county where it was at the time the mortgage was made, and that the mortgagor, Lavesque Mercantile Company, sold and delivered the seventy bales in question to Barnes, in the State of Arkansas, in violation of complainant's rights under the mortgage, and Barnes was thus enabled to ship the cotton to Memphis in his own name and have it sold in the manner already stated.

The chancellor dismissed the bill, and the complainant has appealed.

The general rule of the common law is that any assertion of dominion over the personal property of another, against his will, is a conversion, for which the wrongdoer may be held liable; and it seems that the defendant cannot justify by showing he had at the time no notice of the complainant's rights. Under this rule the defendants, in *Taylor v. Pope,* 5 Cold., 413, were held liable, in which case the facts raised substantially the same question we now have before us. But in the later case of *Roach* v. *Turk,* 9 Heisk., 708, 24 Am. Rep., 360, the case of *Taylor* v. *Pope* was carefully re-examined and was overruled. The principle laid down, or distinction taken, in *Roach* v. *Turk,* was that, where an agent receives property from his principal for sale, and sells it, and accounts to his principal for it, in good faith, it must appear, before liability can be fas-

tened on him, that there was by him the assertion of a dominion adverse to that of the true owner after notice of such true owner's rights. It was held that inasmuch as the defendants therein, who were cotton factors, had sold the cotton, and had paid over the proceeds to the person purporting to be the true owner, from whom they had received it for sale, in good faith, before they had notice of plaintiff's rights, and so had neither the property nor its proceeds in their hands when plaintiff made demand on them, they could not be said to have knowingly or consciously asserted any claim to the property or its proceeds against the plaintiff. So it was said there was no conversion in law. This case was followed in the subsequent cases of *Frizzell* v. *Rundle,* 88 Tenn. (4 Pickle), 396, 12 S. W., 918, 17 Am. St. Rep., 908, *Bank* v. *Hill, Fontaine & Company,* 99 Tenn. (15 Pickle), 42, 41 S. W., 349, and *Embry* v. *Galbreath,* 110 Tenn. (2 Cates), 297, 75 S. W. 1016. But there was an intermediate decision, *Hughes* v. *Abston,* 105 Tenn. (21 Pickle), 70, 58 S. W., 296, which, it is supposed, in effect overruled *Roach* v. *Turk,* since, although that case was not cited, nor apparently in the mind of the court, the result reached, in disposing of the first ground of demurrer therein considered, could not have been attained if the principle laid down in *Roach* v. *Turk* had been recognized as authoritative. The complainants rely on *Hughes* v. *Abston* and *Taylor* v. *Pope,* treating the latter case as revived and rehabilitated as an authority by the former. They also rely upon the common law authori-

ties supporting those two cases, and many authorities from our sister States. The defendants rely upon *Roach* v. *Turk* and the cases based thereon.

In view of the very careful and elaborate consideration of the question in *Roach* v. *Turk*, and the solemn determination in that case that *Taylor* v. *Pope* should be overruled, the obvious hardship of holding a mere agent, who had in good faith received property from and returned it or its proceeds to his principal, guilty of denying a right of which he had never heard, or of which he had never had any legal notice, and it not being shown that he was guilty of any negligence in not acquiring knowledge, and in view of the fact that *Roach* v. *Turk* had been regarded as law for nearly thirty years when *Hughes* v. *Abston* was decided, and had been recognized in two published opinions, and the fact that the great line of business to which it applies had been in this State long adjusted to it—we say, in view of all of these considerations, we should be unwilling, at this late day, to formally overrule that case, or to dissent from its doctrine, even if we were of the opinion that it was erroneously decided. It is almost as important that the law should be certain as that it should be sound. The rule of *stare decisis* is one of commanding importance, giving, as it does, firmness and stability to principles of law evidenced by judicial decisions, and so enabling the people to safely judge of their legal rights. Differentiations, distinctions, limitations, and advances must from time to time be made, it is true, in order to keep the law in

harmony with the common sense, common conscience, and the common sense of justice of each succeeding age which it serves; but these should be so gradual that the new truly grows out of the old, as the product of a changing environment, being but the adaptation of old principles to new facts, and thus causing little, if any, shock to existing rights. Radical changes should be made by legislation only. Sometimes the duty of overruling a former decision is imperative, but the power should be sparingly exercised.

Complainant insists that defendants had notice of its rights, because of the recordation of the mortgage in Arkansas, citing *Newsum* v. *Hoffman*, 124 Tenn., 369, 137 S. W., 490. In that case it was held that by comity a foreign mortgage, duly recorded in the foreign jurisdiction and valid there, would, on removal of the property to this State without the consent of the mortgagee, protect the rights of such mortgagee here, as against one who purchased the property in Tennessee without knowledge of such foreign mortgage. The analogy would be complete if defendants were in possession of the property at the time complainant made demand therefor, or if they were in possession of its proceeds. On such a state of facts there is no doubt the complainant would have the right to recover. But the contest here is not over the property or its proceeds. The case cited, therefore, does not apply. *Frizzell* v. *Rundle*, supra.

The result is the chancellor committed no error in dismissing the bill, and his decree must be affirmed, with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1913.

MANESS *v.* CLINCHFIELD COAL CORPORATION.

(*Knoxville.* September Term, 1913.)

1. **MASTER AND SERVANT. Injuries to servant. Actions. Jury question.**

In a personal injury action, evidence *held* sufficient to show that the servant at the head house of defendant's mine was acting within the scope of his authority and about the business of the master, when he dumped coal into the chute and upon plaintiff. (*Post*, *p.* 150-152.)

2. **MASTER AND SERVANT. Injuries to servant. Fellow servant.**

A master is not liable to a servant for injuries resulting from the negligence of a fellow servant engaged in the common employment, where there has been due care in the selection and employment of the fellow servant. (*Post*, *p.* 152-155.)

Cases cited and approved: Railroad v. Wheless, 78 Tenn., 741; Railroad v. Edwards, 111 Tenn., 31; Railroad v. Lahr, 86 Tenn., 335; Fox v. Sandford, 36 Tenn., 36; Railroad v. Elliott, 41 Tenn., 611; Railroad v. Rush, 83 Tenn., 151.

Cases cited and distinguished: Railroad v. Wheless, 78 Tenn., 741; Railroad v. Edwards, 111 Tenn., 31.

3. **MASTER AND SERVANT. Injuries to servant. Negligence of fellow servant.**

Where a servant employed to represent the master in the general supervision of the work departs from the scope of his employment and does the work of a fellow servant, the master is not liable for his negligence when so employed, but if the negligent servant has been designated by the master as one to perform a personal duty, which the master owes to other servants, his negligence in the performance of that duty is the negligence of the master without regard to the general grade of his employment. (*Post*, *p.* 152-155.)

4. **MASTER AND SERVANT. Injuries to servant. Duty to warn.**

Where a mining company employed a carpenter to repair a coal chute, down which coal was dumped while the carpenter was at work, it is the duty of the company to warn the carpenter before coal is dumped into the chute. (*Post*, *p.* 155-159.)

Cases cited and approved: Western Electric Co. v. Hauselmann, 69 C. C. A., 346; Brewing & Malting Co. v. Bosch, 41 C. C. A., 482; Orman v. Salvo, 54 C. C. A., 265; Pantzar v. Mine Co., 99 N. Y., 368; McGovern v. Railroad, 123 N. Y., 280; Stone Co. v. Mooney, 61 N. J. L., 253; Peters v. George, 83 C. C. A., 408; Curley v. Hoff, 62 N. J. L., 760; Brick Co. v. Shanks, 69 Kan., 306; Hendrickson v. Gypsum Co., 133 Iowa, 89; Brice-Nash v. Barton Co., 79 Kan., 110; Bridge Co. v. Valente, 7 Peunnewill (Del.), 370; Coal Co. v. Hamilton, 107 Tenn., 705; Freeman v. Railroad, 107 Tenn., 340.

Case cited and distinguished: Anderson v. Coal Co., 108 Minn., 455.

5. **MASTER AND SERVANT. Injuries to servant. Negligence of fellow servant.**

Where a mining company had its carpenter repair a coal chute, which was being used while the repairs were in progress, the master is liable for the negligence of another servant, who had

been warning the carpenter before coal was dumped, where he dumped coal down the chute upon the carpenter without warning. (*Post*, *p.* 155-159.)

FROM WASHINGTON.

APPEAL from Law Court of Washington.—DANA HARMON, Judge.

HARR & BURROW, for plaintiff.

J. NORMENT POWELL and J. R. SIMMONDS, for defendant.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

This is an action for personal injuries brought by Maness against the Clinchfield Coal Corporation, which resulted in verdict and judgment for plaintiff in the sum of $10,000. The defendant below appealed to the court of civil appeals, and in that court the judgment was reversed and the suit dismissed.

The declaration charged that the plaintiff was employed by the defendant to repair a coal chute which was used by the defendant for the purpose of conveying coal from cars which carried it out of the mine to railroad cars below, used in loading it for shipment. Plaintiff was at work in the chute near its bottom when the defendant, without warning or notice to him,

dumped a carload of coal into the chute at the top which rolled down the chute and hit the plaintiff.

By an amendment to the declaration made later, it was averred, in addition to the failure to warn, that the defendant had failed to furnish a safe place to work.

The evidence from the plaintiff's view establishes the following facts:

The defendant was operating a certain coal mine, and conveyed the coal from the inside of the mine to its mouth in cars. At or near the mouth of the mine is located what is termed the "head house." The man in charge of the head house would dump the coal out of the cars into a chute which extended downward from the mouth of the mine to a point immediately over two railroad tracks side by side, and the coal would flow out of the chute into cars standing on the railroad tracks. The chute is about 300 feet long, about four feet wide at the bottom, and 3 or 3½ feet high, and slopes inward from the bottom to the top, so that it is about 12 inches wide at the top. It inclines from the head house to the tipple at the railroad tracks at the rate of 7½ inches to the foot so that it was about as steep as an ordinary house roof. A short distance from the foot of the chute was a strong gate. Just below this gate were screen bars, and below the screen bars was a wind or curve in the body of the chute. Coal would be dumped into the chute at the head house and would run down to the gate, where ordinarily it would be caught and held. The gate could be raised

by means of a rope which was operated by men on the railroad cars below the chute. When the gate was raised and the coal released, it would flow over the screen bars, and coal of certain fineness would fall through the bars into a railroad car standing on the railroad track under the screen, and the larger coal would flow over the bars and on down the chute until it struck the wind or curve at the mount of the chute, and would by this curve be deflected into a railroad car standing on another track.

This was the condition a short time before the plaintiff was injured. It became necessary to build a new wind at the end of the chute, and the plaintiff, who was the head carpenter in the service of the defendant, was directed to build the wind with his crew of carpenters. He was also directed to place a shield below the grate bars and above the wind for the purpose of catching coal when released by the gate, and cause it to drop through the opening in the chute at the grate bars, which plaintiff was also directed to remove. This left a hole in the bottom of the chute between the shield and the gate about 16 feet long. Plaintiff and his crew were engaged in building the wind for three or four days with the gate in position. While thus engaged, the defendant continued to dump coal into the chute at the head house in the ordinary and usual operation of its mines, with the exception that during these operations the coal would not be screened, but would all pass through the opening left by the removal of the screen bars into a car standing on the track nearest

the head house and under the opening. Throughout the time that coal was dumped into the chute while plaintiff was at work on the wind, the man at the head house would give timely warning of the intentions to dump the coal into the chute, and plaintiff and his assistants would get out of the chute. This was done with the knowledge of plaintiff and defendant.

Before the wind was completed, plaintiff was ordered by the defendant to remove the gate, and install a new one. This order was given March 1, 1911, and plaintiff was directed to do the work the next day. On the next day, March 2d, the chute was cleaned out and all coal removed, and the plaintiff was notified that it was ready for him to begin the building and installation of the new gate. Part of plaintiff's crew was still at work on the wind. Work on the gate began at 8 o'clock in the morning. During the progress of the work, the man at the head house called down twice, to know if coal could be dumped. At another time, and just a few minutes before plaintiff was injured, plaintiff was informed that because of the congestion of cars brought out of the mines at the head house, cars were getting scarce in the mine, and he was again asked if the gate was completed. He did not notify the man at the head house that the gate was completed. His assistants at work on the wind informed plaintiff that the wind was finished, and requested him to inspect it. He went from his place at the gate to the wind, and from an inspection of it, he discovered that his assistants had not inserted a bolt which he deemed

necessary to its proper completion. Plaintiff laid down on his side in the bottom of the chute, and was taking measurement for the required bolt, when the man at the head house dumped coal into the chute, which came down upon the plaintiff and injured him. The plaintiff's head was under a crossbar which passed through the chute at the wind, at a distance of about 18 inches from the floor. He was given no warning that coal would be dumped into the chute at the head house, but he heard it, and endeavored to extricate himself, but was unable to do so because of the crossbar.

The gate was not finished, and it had not been installed. The plaintiff says that he would have finished the work in 15 or 20 minutes if he had not been injured.

The court of civil appeals was of opinion that the plaintiff and the man at the head house were fellow servants, and for that reason the plaintiff was not entitled to recover. Among other things, that court said:

"The distinction in the two conditions of a safe place to work in and a safe place made unsafe by the act or negligence of a fellow servant is, it seems, plainly to be seen and recognized, and it is recognized in all the texts and decisions to which we have had access which treated of or dealt with cases involving the fellow-servant doctrine or rule of law. If a safe place furnished for an employee is made unsafe by the negligence of a fellow employee, and injury results for which the employer is liable, the whole foundation of

the fellow-servant doctrine, as well as all its incidents, is swept clear out of the realm of court administration of rights, and we need no negligence to abolish and remove it entirely from the field of jurisprudence.

"It is to be understood that we are not dealing with a case where an employer who sees or knows, or ought to know, that an employee, by his negligence or incapacity or ignorance has made or will make a safe place for another employee to work unsafe, stands up and fails to take prompt steps to protect his other employees; in such a case the law, as well as common justice, ought to hold him liable for injury to the nonnegligent employee."

"To hold that an employer is liable for an injury when he puts one of his employees in a safe place to work, in the event another employee or fellow servant by his negligence or omission to perform his duty or performs it recklessly, thereby causing injury to his coemployee and fellow servant, is confining the fellow-servant doctrine within narrower limits than any text or decision that we have been able to find."

There is no evidence to indicate that the coal chute was an unsafe place for plaintiff to work because of any inherent vice or defect in its construction. The very nature of the premises, and the uses to which they were put in the ordinary and usual prosecution of the master's work, would make the place unsafe while the chute was being used. If coal were not dumped in the chute, the place would be safe. It is also shown that plaintiff could have taken himself beyond the zone of

danger if he had been warned by the man at the head house that coal would be dumped.

As already stated, it was the custom of the defendant to warn plaintiff before coal was dumped in time for him to protect himself. Learned counsel for defendant contend that the rule or custom of giving warning was suspended at the time of the injury because the chute was "dismantled," and was in no condition to be used for dumping coal, and therefore the man at the head house was not forwarding the master's business when he dumped the coal in upon plaintiff, but was acting in disregard of the master's interest. It is said that the master, when he directed the man at the head house to cease dumping coal, and notified him of the presence of the plaintiff in the chute, discharged his full duty towards plaintiff. The correctness of this position would seem to depend upon whether there is evidence which would warrant the jury in concluding that the chute was in condition for use in the interest of the master's business at the time of the injury. It should be conceded that if the master had abandoned the work at the time of the injury, or if the chute was in such condition that it could not be used in the business of the master, and these facts were known to the man at the head house, his act in attempting to use an unfit instrumentality would not be within the scope of his employment, and for that reason the master would not be liable. If, however, the chute was usable in the business of the master, the man at the head house would be acting within the scope of

his employment, and in and about the business of the master, whether the chute was in the exact condition of its usual use or not; and this was a question for the jury. The plaintiff's evidence tends to show that the chute was usable, notwithstanding the absence of the gate, on account of the presence of the shield just below the hole in the bottom of the chute left by the removal of the screen bars. It is true that if used in such condition the coal would not be screened, but it is also true that there is evidence indicating that coal was being loaded on the railroad cars unscreened. Hence we conclude that there is evidence which would have warranted the jury in finding that the man at the head house was acting within the scope of his duty and in and about the business of the master when he dumped the last car of coal into the chute. Of course the business of the master at this place was not abandoned. It was merely temporarily suspended and was suspended for the sole reason that plaintiff had been directed to make the repairs heretofore detailed. The employees of defendant were still at work in the mine, and coal was being continually drawn out of the mine into cars that were parked at the head house. There was a railroad car on the track in position to receive coal that would come through the hole left by the removal of the screen bars. This fact is not stated directly in the evidence, but we think the jury were warranted in making such an inference.

The general rule of the common law is in force in this State, to the effect that a master is not responsible

to the servant for injuries resulting from the negligence of a fellow servant engaged in a common employment where there has been due care in the selection and employment of the fellow servant. *Railroad* v. *Wheeless,* 10 Lea, 741, 43 Am. Rep., 317; *Railroad* v. *Handman,* 13 Lea, 423; *Railroad* v. *Edwards,* 111 Tenn., 31, 76 S. W., 897; *Railroad* v. *Lahr,* 86 Tenn., 335, 6 S. W., 663; *Fox* v. *Sandford,* 4 Sneed, 36, 67 Am. Dec., 587, and the cases cited establish that the rule includes the risk of injuries, not only from the servant's want of skill and care, but also the risk of injuries from the negligent acts of his fellow servants; and, in order to charge the master, the negligent servant must so far stand in place of the master as to be charged in the particular matter with the performance of a duty towards his fellow servant, which, under the law, the master owes to such servant. *Railroad* v. *Handman,* supra; *Railroad* v. *Lahr,* supra. And upon this principle, it has been held that if a servant who is employed to represent the master in the general supervision of the work departs from the scope of his employment and does the work of a fellow servant, the master is not liable for his negligence while so engaged. *Fox* v. *Sandford,* supra; *Railroad* v. *Elliott,* 1 Cold., 611, 78 Am. Dec., 506; *Railroad* v. *Wheeless,* supra; *Railroad* v. *Rush,* 15 Lea, 151; *Railroad* v. *Handman,* supra; *Railroad* v. *Lahr,* supra.

The cases last cited, announcing the doctrine of the personal negligence of a superior servant, as well as all of our cases, recognize it to be true that if the

superior servant stands for the master in the performance of the negligent act which causes the injury, the master is liable. And particularly in *Railroad* v. *Edwards,* supra, it is stated that whether the superior servant stands in the place of the master is most satisfactorily determined by ascertaining whether such servant is charged with the performance of a duty towards the other servant which under the law, the master owes him. And the principle of that case is recognized, although not stated in words in *Railroad* v. *Wheeless,* supra. It would seem to follow, as a just and proper corollary of the cases referred to, that if the negligent servant has been designated by the master as the one to perform a personal duty which the master owes his other servants, his negligence in respect of the performance of that duty would be the negligence of the master, without regard to the general grade of his employment. It is for the master to say to whom and in what manner the personal duties which he owes his servants should be discharged. He may perform them in person, or he may designate others to stand for him in the matter of their performance, as he may see proper; but in either event, he is liable for negligence in the performance of the duty.

So the important inquiry in this case is whether the master owed to Maness the duty to warn him that coal would be dumped, and thus enable him to find a place of safety. If the duty existed, it would be a mere quibble upon words to say that the person to whom its performance was delegated, and whose negligence in

the discharge of such duty caused the injury, was the fellow servant of Maness. It is generally held by the American cases that the master cannot delegate the personal duties he owes his servant so as to relieve himself of liability for negligence in their performance.

In this case, it is not a matter of dispute as to whether the master owed the duty of warning to the plaintiff. This duty was conceded by the master assuming it on previous occasions. Plaintiff knew that the master had assumed to give the warning and relied upon it. As we understand learned counsel for defendant, this is not denied, but it is insisted that the rule was suspended at this particular time because the master had dismantled the chute, had ordered the man at the head house to cease using it, and had notified him of the presence of the plaintiff in the chute. But clearly this is a question of fact found against the defendant by the jury.

We should say, however, that if it were a matter of dispute as to the duty of the defendant to give warning to the plaintiff before coal was dumped into the chute, we would hold that such was its duty. We do not mean to say that, if two or more servants are engaged in a common employment under the same master, the master would be liable for the failure of each coservant to give warning to his fellow servants of sudden and unexpected danger which might arise in the performance of the details of the master's work. Such could not be the law under our cases cited, supra.

But the principle which controls this case, and which we hold to be a sound one, is thus stated by the supreme court of Minnesota, speaking through Mr. Justice Jaggard:

"When an employee is at work in a place safe in itself, but which by virtue of some independent work done for the master's purposes becomes dangerous, unless prior warning of the impending danger be given, and when the master has required such notice to be given, or has assumed to customarily give such warning through an employee, the person charged with that duty is a vice principal. For his negligence therein the master is liable." *Anderson* v. *Pittsburgh Coal Co.*, 108 Minn., 455, 122 N. W., 794, 26 L. R. A. (N. S.), 624.

The later cases upon this subject are very numerous and support the principle just stated. In addition to the Minnesota case, we cite the following as representative of the more recent judicial opinion and as indicating the modern trend of judicial decision. *Western Electric Co.* v. *Hanselmann*, 69 C. C. A., 346, 136 Fed., 564, 70 L. R. A., 765; *Toledo Brewing & Malting Co.* v. *Bosch*, 41 C. C. A., 482, 101 Fed., 530; *Orman* v. *Salvo*, 54 C. C. A., 265, 117 Fed., 233; *Gustave Pantzar* v. *Tilly Foster Iron Mine Co.*, 99 N. Y. 368, 2 N. E., 24; *McGovern* v. *Railroad*, 123 N. Y., 280, 25 N. E., 373; *Bellville Stone Co.* v. *Mooney*, 61 N. J. L., 253, 39 Atl., 764, 39 L. R. A., 834; *Peters* v. *George*, 83 C. C. A., 408, 154 Fed., 634; *National Steel Co.* v. *Lowe*, 62 C. C. A., 229, 127 Fed., 311; *Curley* v. *Hoff*, 62 N. J. L.,

760, 42 Atl., 731; *Brick Co.* v. *Shanks*, 69 Kan., 306, 76 Pac., 856; *Hendrickson* v. *Gypsum Co.*, 133 Iowa, 89, 110 N. W., 322, 9 L. R. A. (N. S.), 555, 12 Ann. Cas., 246; *Brice-Nash* v. *Barton Co.*, 79 Kan., 110, 98 Pac., 768, 19 L. R. A. (N. S.), 751, 131 Am. St. Rep., 284.

There are many of the older cases which apply the generally accepted formula of the doctrine of fellow servant in a dogmatic way to facts similar to those of this case, and which are in conflict with our holding here, and the authorities cited. There are a few of the more recent cases which still adhere strictly to this ancient doctrine of fellow servant and apply it to any negligent act of a servant whereby a coservant is injured and hold the master not to be liable.

Compare sections 580 and 601 of the first edition of Labatt's Master & Servant, with pages 29 and 36, vol. 3, of the last edition of the same work.

However, we do not wish to be understood as holding, and we do not hold, that the master is under the personal duty of giving notice to servants engaged in a common employment of dangers arising from the execution of the details of the work which they are employed to do. *American Bridge Co.* v. *Valente*, 7 Pennewill (Del.), 370, 73 Atl., 400, Ann. Cas., 1912D, 69. This case does not present that question. What we do hold is that the master may not place his servant at work in a place made unsafe by the nature of work of other servants performing services for the master, disconnected with work of the injured servant, without due care to furnish such servant adequate pro-

tection. *Va. Iron & Coal Co.* v. *Hamilton,* 107 Tenn., 705, 65 S. W., 401. If it is necessary to give warning, he must do that. *Freeman* v. *Railroad,* 107 Tenn., 340, 64 S. W., 1. It is no answer to his liability to say that a fellow servant was designated to give the warning and was negligent. The giving of the warning is a masterial duty. In this case it had no connection with the mining of coal or with dumping it into the chute, and thence onto the railroad cars, or with repairing the chute. It was as separate and distinct from the performance of the ordinary work of the common employment as the duty of promulgating rules for the safety of employees. And the failure to give the warning could no more be said to be the negligence of a coservant than the failure to promulgate rules. It relates to the personal duty which the master owes to every servant not to needlessly expose him to peril, and it has especial application to the facts of this case because the servant was engaged in engrossing work and in a position where it was impossible for him to look out for himself. This the master knew because he ordered him to do the particular thing and this the fellow servant at the head house knew. Therefore, when the man at the head house was designated as the one to give the warning he stood in respect to that particular duty as the representative of the master, and his negligence was the negligence of the master.

The proximate cause of plaintiff's injury is the failure to warn, and not the dumping of the coal. It

is shown beyond doubt that coal had been previously dumped, and could have been dumped on this occasion, with safety to the plaintiff if he had been warned in due time.

LUSTER *v.* GARNER *et al.*

(*Knoxville.* September Term, 1913.)

EASEMENTS. Extent of right. Obstruction. Gates.

The owner of a servient estate can establish and maintain suitable gates at the termini of an easement of way acquired by an adjoining owner of farming lands by prescription; the prescriptive period maturing while the lands were uninclosed woodland, during which no gates or bars were maintained. (*Post*, *pp.* 162, 163.)

Cases cited and disapproved: Fankboner v. Corder, 127 Ind., 164; Shivers v. Shivers, 32 N. J. Eq., 578; Rogerson v. Shepherd, 33 W. Va., 307.

Cases cited and approved: Ames v. Shaw, 82 Me., 379; Hartman v. Fick, 167 Pa., 18; Dyer v. Walker, 99 Wis., 404.

FROM HAWKINS.

Appeal from Chancery Court, Hawkins County.—HUGH G. KYLE, Chancellor.

J. O. PHILLIPS, for complainant.

A. T. BOWEN, for defendants.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

A single question of law is presented for determination in this cause: May the owner of a servient estate, now inclosed as agricultural lands, but formerly open woodland, establish and maintain suitable gates at

the termini of an easement of way acquired by an adjoining owner of farming lands by prescription; the prescriptive period maturing while the lands were uninclosed woodland, during which no gates or bars were maintained?

The authorities are at variance as to the rights of the servient owner to erect gates at the ends of a way acquired by prescription; some of the authorities holding that, where gates had not been maintained during the prescriptive period, they cannot be erected against the wish of the owner of the dominant estate, since the extent of the right is held to be commensurate with and determined by the use. *Fankboner* v. *Corder*, 127 Ind., 164, 26 N. E., 766; *Shivers* v. *Shivers*, 32 N. J. Eq., 578 (affirmed 35 N. J. Eq., 566); *Rogerson* v. *Shepherd*, 33 W. Va., 307, 10 S. E., 632.

Courts of other jurisdictions, however, hold that it is the nature of the easement acquired that should determine, and that gates may be constructed at the termini of a prescriptive passway, if they be not an unreasonable interference with the use of the way. *Ames* v. *Shaw*, 82 Me., 379, 19 Atl., 856; *Hartman* v. *Fick*, 167 Pa., 18, 31 Atl., 342, 46 Am. St. Rep., 658; *Dyer* v. *Walker*, 99 Wis., 404, 75 N. W., 79.

That learned annotator, Abraham C. Freeman, in a monographic note to *Dudgeon* v. *Bronson*, 95 Am. St. Rep., 321, said that, while the rule declared by the latter line of cases may be the better one, it yet seems to be opposed to the weight of authority; he,

however, citing only the Maine case of *Ames* v. *Shaw* in support of what is thus indicated to be the better rule.

When the other cases cited above are taken into reckoning, it may be doubted whether the weight of authority be as thus signified.

In *Hartman* v. *Fick*, supra, the right of way involved was one acquired by prescription, and, as here, over inclosed woodland, and the right to devote the land to agriculture by erection of gates was sustained; the court saying: "No question is left undisposed of, except that of the legal right of the owner of land to protect his fields by such gate or other structure as should not unreasonably interfere with the use of the way. The easement was only for passage. The land remained the property of the plaintiff, and he had a right to use it for any purpose that did not interfere with the easement. To do this it might be necessary, under some circumstances, to inclose the way with the field over which it passes, and, if this is done with a reasonable regard to the convenience of the owner of the easement, it affords him no just ground of complaint. The tendency of our legislation is in this direction, and such is also the fair effect of *Connery* v. *Brooke*, 73 Pa., 80."

The latest case appears to be *Dyer* v. *Walker*, supra (1898), which has similar relation on its facts and like result as to principle announced.

We are persuaded that, not only on precedent and principle, but also on the ground of sound policy, the

right of the owner of the fee to erect and maintain such gates should be declared. A very considerable portion of the lands in this State are in mountains or foothills, frequently making it convenient, almost to the point of necessity, for a landowner to have ingress and egress over the lands of a lower owner through such defiles or "hollows" as appear in the facts of this case. To hold against the right to erect gates would have a twofold effect—of rendering more difficult the acquirement of such a way by adverse user, and of discouraging the improvement of land, a change from woodland, that may be nonproductive of profit, into cultivated fields.

The court of civil appeals followed the line of cases contra, and its decree is therefore reversed and a decree entered here in accord with the above ruling.

BUTLER *v.* STATE.

(*Knoxville.* September Term, 1913.)

1. **STATUTES. Title of Act. Crimes. Amending act.**

The title of Acts 1870-71, ch. 36, which was "An act to amend the laws upon the subject of trespass upon property and malicious mischief," was broad enough to include section 1 of the act, which now appears as Shannon's Code, sec. 6496, subsec. 8, forbidding the wanton destruction of valuable timber of another, since that title evidently intended to embrace the matters within the article of the Code of 1858 in which the original section appeared, and which was entitled "Trespass on Property, Malicious Mischief and Keeping Dogs That Kill Sheep." (*Post*, *pp.* 165, 166.)

Code cited and construed: Sec. 6496, subsec. 8 (S.).

Acts cited and construed: Acts 1870-71, ch. 36.

2. **TRESPASS. Cutting timber. Defenses. Right of possession.**

Where one of two parties, who held deeds which overlapped as to a portion of the premises, had an inclosure upon the property covered by her deed, her possession extended to all the property described in her deed, including the interlap, so that one cutting timber therefrom with authority from her was not guilty of violating Shannon's Code, sec. 6496, subsec. 8, prohibiting the wanton destruction of the timber of another, even though the other party had the legal title to the interlap. (*Post*, *p.* 167.)

Case cited and approved: Lieberman v. Clark, 114 Tenn., 117.

3. **TRESPASS. Cutting timber. Construction of statute.**

Shannon's Code, sec. 6496, subsec. 8, prohibiting the wanton destruction of timber of another, is intended to protect the possession, not the title, and does not apply to one cutting timber under the authority of one claiming title, who was

in possession thereof, even though in fact another had the legal title. (*Post*, *p.* 167.

Case cited and approved: Deaderick v. State, 122 Tenn., 222.

FROM ROANE.

Error to Circuit Court, Roane County.—S. C. BROWN, Judge.

J. W. STONE, for plaintiff in error.

WALTER W. FAW, Assistant Attorney-General, for the State.

MR. JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error was indicted in the circuit court of Roane county for the violation of subsection 8 of section 6496 of Shannon's Code.

The section reads:

"It is declared to be a misdemeanor: . . . (8) To knowingly, willfully, and wantonly cut down and destroy valuable timber of another, whether the owner be personally present forbidding the same or not."

This subsection was amended, so as to read as it now appears, by chapter 36 of the Acts of 1870-71. This act is as follows:

"An act to amend the laws upon the subject of trespass upon property and malicious mischief.

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that subsection 8, of section

4652 of the Code, be so amended as to read: 'To knowingly, willfully and wantonly cut down and destroy valuable timber of another, whether the owner be personally present forbidding the same or not.'

"Sec. 2. Be it further enacted, that subsection 9, of section 4652 of the Code, be so amended as to read as follows: 'To knowingly or willfully destroy or carry away the rails or boards, wood or other lumber of another.'

"Sec. 3. Be it further enacted, that subsection 10, of section 4652, be so amended as to read: 'To willfully and wantonly break or thrown down, mar, deface or otherwise injure any fence, hedge or ditch, inclosing the land of another.'

"Sec. 4. Be it further enacted, that to enter upon the garden, orchard or improved or inclosed lands of another, and willfully or wantonly to sever, destroy, carry away or injure the trees, shrubs, grain, grass, hay, fruit or vegetables there being, shall be declared to be a misdemeanor. This act to take effect from and after its passage, the public welfare requiring it.

"Passed January 11, 1871."

It is said that the first section, which is the one referred to, is broader than the caption. We think it is clear this is an incorrect view. The caption is very broad. It was evidently intended to cover the various matters embraced within the article under which subsection 8 of section 6496 (Code of 1858, sec. 4652) appears. The caption of that article is: "Trespass on

Property, Malicious Mischief, and Keeping Dogs That Kill Sheep.''

This question out of the way, the case must be decided upon the facts.

It appears that the prosecuting witness, J. S. Christenberry, has a deed to a certain tract of land in Roane county; also that Miss McKamy has a deed covering a part of the same land. Miss McKamy authorized plaintiff in error to go upon the interlap and cut timber. He did so. To punish him for this the present prosecution was instituted. The interlap was not inclosed by any fence, but Miss McKamy had an inclosure upon the land covered by her deed, which, of course, extended her possession to the interlap, so that she had actual possession of it (*Lieberman* v. *Clark,* 114 Tenn., 117, 85 S. W., 258, 69 L. R. A., 732), at the time she authorized the plaintiff in error to cut the timber. The prosecutor, Christenberry, never had any actual possession of the land, nor is it shown that he had the legal title, so as to give him what is called constructive possession. Even if he had the legal title, however, this would not avail him in an action of this kind against such possession as Miss McKamy had. *Lieberman* v. *Clark,* supra, and authorities cited.

But the section in question was not intended to involve consideration of the legal title, but only that of possession. The case, in this aspect, falls within the principle of *Deadcrick* v. *State,* 122 Tenn., 222, 122 S. W., 975. The purpose of subsection 8 was the same as that of subsection 7, considered in the case just re-

ferred to. It is true there is some difference in the class of cases to which the two subsections apply. Subsection 7 involves the idea of the conversion of the timber to one's own use. Subsection 8 would cover a trespass upon timber, whether the offending party intended to apply it to his own use or not. It would cover a case of mere wanton destruction, as in the case of hunters cutting down trees to obtain game. It would also cover the case of cutting and removing the timber, because that would be destruction so far as concerned the owner. It is apparent from this examination that, while subsection 8 is broader than subsection 7, it must fall within the same category, as both provisions of the law were designed to protect the possession.

Since the prosecutor had no possession of the land which could be protected by the statute, and Miss McKamy did have possession, and plaintiff in error entered and cut the timber under her authority, he is guilty of no offense under the subsection referred to.

It results that the judgment of the court below must be reversed, and the court suggests to the attorney-general that he enter a *nolle prosequi*.

SOUTHERN RAILWAY CO. *v.* BACON.*

(*Knoxville.* September Term, 1913.)

1. **CARRIERS. Carriage of live stock. Limitation of liability. Notice of claim.**

A clause in a contract for the shipment of live stock, which required notice in writing of a claim for damages for loss or injury to live stock before its removal or intermingling with other stock, does not apply to a claim for animals which died during the shipment, since notice of such loss is not required to enable a carrier to protect itself from fraudulent claims, and its agent must have known that the animals were dead, so that he could have made an immediate investigation. (*Post*, *pp.* 170, 171.)

Cases cited and approved: Kansas, etc., R. Co. v. Ayers, 63 Ark., 331; Missouri, K. & T. Ry. Co. v. Frogley, 75 Kan., 440; L. & N. R. Co. v. Warfield & Lee, 6 Ga. App., 550; Patterson v. K. & T. Ry. Co., 24 Okla., 747; Pierson v. Northern Pac. Ry., 61 Wash., 450.

2. **CONTRACTS. Construction. Extrinsic circumstances.**

A contract must be construed with reference to the situation of the parties, the business to which it relates, and its subject-matter. (*Post*, *p.* 171.)

FROM WASHINGTON.

Error to Law Court, Washington County.—DANA HARMON, Judge.

*On the question of the removal of live stock from carrier's premises before notice of claim for damages where such notice is given in time for examination, see note in 24 L. R. A. (N. S.), 866.

HARR & BURROW, for plaintiff in error.

DIVINE & GUINN, for defendant in error.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

This suit was brought to recover the value of certain live stock shipped under a limited liability contract. When the animals reached the place of destination, Baltimore, five were dead.

The provision of the contract under which the controversy arises was as follows:

"That as a condition precedent to any right to recover any damages for loss or injury to said live stock, notice in writing of the claim therefor shall be given to the agent of the carrier actually delivering said live stock, whenever such delivery may be made, and such notice shall be so given before said live stock is removed, or is intermingled with other live stock."

It is proven that the animals were each worth more than the value stipulated in the contract. No notice of any claim for damages for the death of these animals was given to the company before they were removed from the car.

The only question presented is whether the condition covers dead animals. The trial court and the court of civil appeals both held that it did not. We are of the opinion that his conclusion was correct. Where animals are injured, and a claim is intended to be made for damages, the carrier should have an opportunity

of inspection fairly equal to that of the shipper, in order to ascertain the nature and extent of the injuries claimed for. After they are removed and intermingled with other animals, it would be practically impossible for the carrier to protect itself from fraudulent or false claims. The reason does not apply to dead animals. There can be no intermingling with other animals, and the agent who makes delivery necessarily has his attention drawn to the dead animals, and can make such inspection as he deems fit at once. Therefore it could not be that the parties intended to cover such a case. Contracts must be construed with reference to the situation and surroundings of the parties, the nature of the business in which they are engaged and to which the contract relates, and also with reference to the subject-matter.

The same result has been reached in other States where the question has arisen. *Kansas, etc., R. Co.* v. *Ayers*, 63 Ark., 331, 38 S. W., 515; *Missouri, K. & T. Ry. Co.* v. *Frogley*, 75 Kan., 440, 89 Pac. 903; *L. & N. R. Co.* v. *Warfield & Lee*, 6 Ga. App., 550, 65 S. E., 308; *Patterson* v. *K. & T. Ry. Co.*, 24 Okla., 747, 104 Pac., 31; *Pierson* v. *Northern Pac. Ry.*, 61 Wash., 450, 112 Pac., 509.

There is no error in the judgment of the court of civil appeals, and it is affirmed.

LOUISVILLE & N. R. Co. *v.* STATE.

(*Knoxville.* September Term, 1913.)

1. **RAILROADS. Construction. Highway crossings. Statute. Construction.**

Acts 1899, ch. 356, requiring railroad companies to grade public road crossings to a level with the rails of the railroad, and to keep same in repair for a distance of ten feet on each side of the track, is supplementary of, and auxiliary to, Acts 1889, ch. 119, providing for the furnishing and keeping in repair of good and sufficient crossings, and hence is not repugnant to same, and does not impliedly repeal it. (*Post*, *pp.* 173, 174.)

Acts cited and construed: Acts 1889, ch. 119, ch. 356.

Cases cited and approved: Balden v. State, 122 Tenn., 717; Cate v. State, 35 Tenn., 120; Durham v. State, 89 Tenn., 730; U. S. v. Barnes, 222 U. S., 513, 520.

2. **RAILROADS. Construction and maintenance. Crossing highways. "Crossing."**

The word "crossing," as applied to the intersection of a common highway and a railroad, and as used in the statutes relating to such crossings, means the entire structure, including the necessary approaches, though a part may be outside of the railroad's right of way. (*Post*, *p.* 175.)

Cases cited and approved: Roxbury v. Central Vermont R. Co., 60 Vt., 121; Moberly v. Kansas City, etc., R. Co., 17 Mo. App., 518, 539; Farley v. Chicago, etc., R. Co., 42 Iowa, 234; Louisville, etc., R. Co. v. Com., 149 Ky., 459.

FROM BLOUNT.

Appeal from Circuit Court, Blount County.—S. C. BROWN, Judge.

THOS. N. BROWN and GAMBLE & CRAWFORD, for plaintiff in error.

WALTER W. FAW, Assistant Attorney-General, for the State.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The appellant railroad company was found guilty of a misdemeanor under a presentment which charged a failure "to make and furnish a good and sufficient crossing" of a certain public highway "and to keep the same in lawful repair;" the insistence in behalf of the State being that the prosecution was under Acts 1889, ch. 119, which imposes upon railroad companies, in the terms of the presentment, such duties in respect of public highway crossings.

The delinquency of the prosecuted company relied on in proof was in failing to keep in repair a bridge over a ravine alongside the track, which bridge, sixteen feet high and sixty feet in length, had been constructed by the company when, more than ten years ago, it raised the grade of the track at that point. This bridge was kept in repair by the company for several years, but later it refused to continue doing so, on the ground that the bridge at its nearest point to the track was forty feet distant therefrom, and therefore no part of the crossing.

The case, as made up in this court, turns on the validity of this insistence; it being a fact that the bridge was thus distant from the track.

The first contention is that Acts 1889, ch. 119, was by implication repealed by the later act (Acts 1899, ch. 356), which provides that railroad companies "shall be required to grade to a level with the rails of said railroad and to keep in repair every public road crossing such railroad for a distance of ten (10) feet on each side of said railroad track and between the rails thereof."

In *Balden* v. *State,* 122 Tenn., 705, 717, 127 S. W., 134, 139, on a review of former decisions, it was said that repeals of statutes by implication are not favored, and that "the repugnance between the two statutes must be very plain and unavoidable. Both the terms and the necessary operation of the two acts must be incapable of reconciliation before the older act will be repealed by the later one . . . . It is well settled that where the later statute does not cover or embrace all the provisions of the earlier one, and does not manifest a clear and unmistakable intention to provide and substitute a new system for the old, the provisions of the earlier act not clearly covered by the later one are unaffected and still in force, and the repeal operates only to the extent of the repugnance and conflict"—citing *Cate* v. *State,* 3 Sneed, 120; *Durham* v. *State,* 89 Tenn., 730, 18 S. W., 74. See, also, *United States* v. *Barnes,* 222 U. S., 513, 520, 32 Sup. Ct., 117, 56 L. Ed., 291, 294.

"When the legislative power professes to add to the law, as it does in the enactment of an affirmative statute, we cannot assume for it an intention also to sub-

tract from it, while there is any admissible rule of interpretation which, applied to the old, to the new, or to both, will enable all to stand." Bishop, Statutory Crimes (3 Ed.), sec. 115.

Looking to the earlier act of 1889, it is found to provide for the furnishing and keeping in repair of "good and sufficient crossings," without further details or specifications. The later act of 1899 may, and under the rule of construction above quoted should, be construed to add to such earlier broadly stated requirement the later one, defining how a *particular* portion of the crossing shall be constructed: A specification that for a distance of ten feet on each side of the track and between the rails the crossing shall be graded to a level with the rails and thus kept in repair. Thus construed by us, the later act is supplementary of and auxiliary to the older one, and not in manifest or total repugnance to it.

It is next insisted that it was not made to appear in proof that any part of the bridge complained of was on the railroad company's right of way, and that therefore, under the act of 1899, this bridge should be deemed to be no part of the "crossing" there called for. The word "crossing," as applied to the intersection of a common highway and a railroad, and as used in the statutes relating to such crossings, means the entire structure, including the necessary approaches, though a part may be outside of the railroad's right of way. *Roxbury* v. *Central Vermont R. Co.*, 60 Vt., 121 14 Atl., 92; *Moberly* v. *Kansas City, etc., R. Co.*, 17

Mo. App., 518, 539; *s. c.*, 98 Mo., 183, 11 S. W., 569; *Farley* v. *Chicago, etc., R. Co.*, 42 Iowa, 234; *Louisville, etc., R. Co.* v. *Com.*, 149 Ky., 459, 149 S. W., 898; 3 Elliott, Railroads, secs. 1097, 1107.

It is not not disputed that the bridge was a part of the approach, and necessary to enable travelers on the highway to cross the track.

Affirmed.

MAYOR AND ALDERMEN OF KNOXVILLE *v.* BARTON.*

(*Knoxville.* September Term, 1913.)

1. **MUNICIPAL CORPORATIONS. Public improvements. Damages. Changing grade of streets. "All benefits accruing."**

Under Acts 1891, ch. 31, as amended by Acts 1893, ch. 41, the first section of which allows to an abutting property owner consequential damages incident to changing the grade of a street, and the second section of which provides that "all benefits accruing" from such improvements shall be allowed to reduce the damages, "all benefits accruing" means accruing to the owner as owner of the particular property, not as a taxpayer or resident of the vicinity sharing benefits common to all. (*Post*, *pp.* 178, 179.)

Acts cited and construed: Acts 1891, ch. 31; Acts 1893, ch. 41.

Case cited and approved: Humes v. Knoxville, 20 Tenn., 403.

2. **MUNICIPAL CORPORATIONS. Public improvements. Damages. Changing grade of streets.**

Acts 1891, ch. 31, as amended by Acts 1893, ch. 41, secs. 1, 2, relating to the allowance of damages to abutting property owners from a change in the grade of a street and the deduction of benefit, is to be given a liberal construction in favor of the citizen affected. (*Post*, *p.* 179.)

Cases cited and approved: Nashville v. Nichols, 62 Tenn., 338; Knoxville v. Harth, 105 Tenn., 436; Chattanooga v. Geiler, 81 Tenn., 611; Acker v. Knoxville, 117 Tenn., 224.

Code cited and construed: Code (T. & S. and 1858), secs. 1392-1394.

FROM KNOX.

*On the question of the duty of a property owner to minimize damages from change of street grade, see note in 44 L. R. A. (N. S.), 301.

Error to Circuit Court, Knox County.—Von. A. Huffaker, Judge.

W. T. Kennerly, for plaintiffs in error.

Green, Webb & Tate, for defendant in error.

Mr. Justice Williams delivered the opinion of the Court.

This suit must turn for solution on the construction of Acts 1891, ch. 31, as amended by Acts 1893, ch. 41, the first section of which allows to an abutting owner consequential damages incident to a changing of the grade of a street, and the second section of which is as follows:

"No benefits accruing by reason of such improvements, acts or works shall be allowed to . . . reduce" and offset "the damages hereinbefore provided for."

The contention in behalf of the city is that the trial judge erred in charging the jury, in substance, that the city was only entitled to set off against plaintiff Barton's damages, growing out of the change of the grade of the street alongside her property, only such incidental benefits as were special and peculiar to that property, and not those benefits which were common to all other property in the locality as incident to the improvements. The argument in behalf of the city is that at common law a municipality was not liable to an abutting owner for a change of street grade (*Humes*

v. *Knoxville*, 1 Humph., 403, 34 Am. Dec., 657), and that, the remedy granted such owner being purely statutory, the language of the statute should not be restricted by judicial construction, and that the provision of section 2, "that *all benefits* accruing by reason of such improvements *shall* be allowed to affect or reduce and offset the damages," by fair and necessary intendment includes benefits that are common to all owners in the vicinity as well as those that are special.

This court has, however, adopted the rule that a liberal construction shall be given to such statutes in favor of the rights of the citizen affected. *Nashville* v. *Nichol*, 3 Baxt., 338; *Knoxville* v. *Harth*, 105 Tenn., 436, 58 S. W., 650, 80 Am. St. Rep., 901.

In no reported case does it appear that, on an appeal and assignment of error by a municipality, has this provision of the statute been construed.

An earlier statute (Code 1858, secs. 1392-1394), which provided for compensation to the owner in "the full amount of damages" suffered by a change of grade, was construed not to provide for any mitigation of damages by reason of benefits common to all property holders. *Chattanooga* v. *Geiler*, 13 Lea, 611, 618. The report of this case is defective in omitting the word "not" from the phrase "could mitigate" in the body of the opinion. This is manifest from the headnote, which includes that word, from the context and the attitude of the city as the appealing party and ex-

ceptant, and also from the authority cited by the court in support of the ruling.

The statute now under construction was discussed by this court in *Acker* v. *Knoxville,* 117 Tenn., 224, 229, 96 S. W., 973, 975, and a charge of the trial judge approved and embodied a statement "that benefits and advantages and general increase in property shared in by a community as a whole cannot be looked to for the purpose of placing it to the disadvantage of a particular owner, who brings an action of this character." The abutting owner, and not the city, was the appealing party, and the particular rule here under discussion was not, therefore, in challenge or review.

Recurring to the terms of the second section of the statute, as amended, we hold that the clause "all benefits accruing" means accruing to the owner, as owner of the particular property affected, and not as a taxpayer, or resident of the vicinity sharing benefits common to all.

Other assignments of error urged by the city have been considered, and, without discussion here, are held to be either immaterial or not well taken; the result being an affirmance of the judgment of the court of civil appeals.

KNAFFLE *et al. v.* KNOXVILLE BANKING & TRUST CO.

(*Knoxville.* September Term, 1913.)

1. **BANKS AND BANKING. Set-off by depositor.**

Although the Negotiable Instruments Law (Laws 1899, ch. 94) declares that the maker shall be primarily liable for the payment of a negotiable instrument, nevertheless, where one who signed as maker seeks to set off his deposit in an insolvent bank against his liability to the bank on the note, he will not be treated as the real party in interest, where he signed for the benefit of his comaker in order to enable him to negotiable the instrument. (*Post*, *pp.* 183, 184.)

Acts cited and construed: Acts 1899, ch. 94.

Cases cited and approved: Building, etc., Co. v. Northern Bank, 206 N. Y., 400; Winne v. Winne, 166 N. Y., 263, 271.

2. **SET-OFF AND COUNTERCLAIM. Equitable set-off. Nature.**

The remedy of equitable set-off may be enforced independently of the statutes, where from the nature of the claim or the situation of the parties it is impossible to obtain justice by plea or cross-action. (Post, p. 184.)

Cases cited and approved: Wilson v. Exchange Bank, 122 Ga., 495; Corbett v. Hughes, 75 Iowa, 282; Lindsay v. Jackson, 2 Paige (N. Y.), 581; Becker v. Northway, 44 Minn., 61; Scholz v. Steiner, 100 Ala., 148; Graham v. Middleby, 213 Mass., 437; Nolan Bros. Lumber Co. v. Dudley Lumber Co., 128 Tenn., 11.

3. **BANKS AND BANKING. Equitable set-off by depositor.**

Where a depositor in a bank signed a note to the bank as comaker, merely for the accommodation of the real maker and to enable him to negotiate it, the depositor will not, upon the insolvency of the bank, be permitted to set off against his liability on the note his rights against the bank based upon his deposit therein; it appearing that the real maker

was not yet insolvent and that the bank had not sought to subject the depositor to liability, for to permit him such a right would work injustice by means of an equitable set-off. (*Post*, *p.* 186.)

Cases cited and approved: Nashville Trust Co. v. Bank, 91 Tenn., 336, 347; In re Middle District Bank, 9 Con. (N. Y.), 414; Davis v. Industrial Mfg. Co., 114 N. C., 321; Edmondson v. Thomasson, 112 Va., 326; New Farmers' Bank v. Young, 100 Ky., 683.

4. BANKS AND BANKING. Equitable set-off by depositor.

Upon the insolvency of a bank, unmatured claims against it will be treated as matured, for the purpose of enabling the holder to obtain the right of equitable set-off. (*Post*, *p.* 187.)

Case cited and disapproved: Clark v. Sullivan, 2 N. D., 103.

FROM KNOX.

Appeal from Chancery Court, Knox County.—WILL D. WRIGHT, Chancellor.

POWERS & THORNBURGH, for appellants.

J. H. FRANTZ, for petitioner Holloway.

WRIGHT & JONES, D. C. WEBB, and HUGH M. TATE, for receiver.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Under an intervening petition filed in this, a proceeding to wind up defendant bank as an insolvent corporation, it appears that, at the date of insolvency found, a note to the bank as payee, to mature approxi-

mately three months thereafter, had been executed by McNichols Art Shop and Mrs. J. A. McNichols, whose signatures were appended as if both were makers, and that the first (the trade name of R. T. P. McNichols) received the proceeds; the second signer becoming surety when the bank required a second name on the paper. Mrs. J. A. McNichols had deposits in the bank that aggregated a sum greater than the amount of the note.

The petition was filed by both the McNicholses, son and mother, seeking to have her deposits set off in payment of the note. The son, principal obligor on the note, is not alleged to be insolvent, and is in fact solvent. The receiver of the bank answered, resisting the grant of relief; and the chancellor and court of civil appeals have held with the receiver and denied the claim of set-off.

The first insistence is that both of the signers of the note are, under the Negotiable Instruments Act (Acts 1899, ch. 94), to be deemed primarily liable so far as the bank is concerned, and no one of them a surety.

In *Building, etc., Co.* v. *Northern Bank,* 206 N. Y., 400, 99 N. E., 1044, where it appeared that two persons, solely for the accommodation of plaintiff company, had as makers executed their note to it as payee, which note it had indorsed to defendant bank, it was held that such indorser would be treated as the one "primarily liable" on the instrument, in testing its right to equitable set-off against its deposit in the bank in insolvency proceedings. The court said:

"It nowhere appears from the Negotiable Instruments Law, or from anything that can be considered in determining the intention of the legislature, that said sections 3 and 55 [in relation to primary liability] were intended to prevent the courts from determining in equity all questions between an insolvent holder of a note and the one primarily liable for the indebtedness on the instrument as a matter of fact, whether maker or indorser. . . .

"If we assume that in an action at law the makers of the note must arbitrarily be treated as primarily liable thereon, and the plaintiff as secondarily liable thereon, it does not prevent the court in an action in equity from determining and enforcing the rights of the parties as the same are found as a matter of fact. *Winne* v. *Winne,* 166 N. Y., 263, 271 [59 N. E., 832, 82 Am. St. Rep., 647.]."

In this view of the Negotiable Instruments Act we concur; and, on the proof, Mrs. J. A. McNichols is to be treated, not as comaker, but as a surety secondarily liable, for the purpose of testing her right of equitable set-off.

The point yet more seriously contested is the remedy of the surety to have equitably offset her deposits against the note. She has not been sued on the note; and we have not, therefore, for consideration how far she could in such an action successfully plead in set-off this demand, as to which see *Wilson* v. *Exchange Bank,* 122 Ga., 495, 50 S. E., 357, 69 L. R. A., 97, 2 Ann. Cas., 597, and *Corbett* v. *Hughes,* 75 Iowa, 282,

39 N. W., 500 (which seem to make the matter turn on whether or not the demand grew out of the transaction in which the note was executed).

The remedy of equitable set-off may be enforced independently of the statutes governing set-off, where from the nature of the claim, or from the situation of the parties, it is impossible to obtain justice by plea or cross-action. *Lindsay* v. *Jackson,* 2 Paige (N. Y.), 581; *Becker* v. *Northway,* 44 Minn., 61, 64 N. W., 210, 20 Am. St. Rep., 543; *Scholze* v. *Steiner,* 100 Ala., 148, 14 South., 552. But there will be a grant of the remedy only for the purpose of securing an equitable result, and not where its allowance would work on injustice to others having equal equities. *Graham* v. *Middleby,* 213 Mass., 437, 100 N. E., 750, 43 L. R. A. (N. S.), 977, 981; 34 Cyc., 726, and cases cited.

In *Nolan Bros. Lumber Co.* v. *Dudley Lumber Co.,* 128 Tenn., 11, 156 S. W., 465, the nature of equitable set-off was considered, and it was there held that where a defendant sued was an indorser of a note executed by the plaintiff's assignor, as maker, and had been forced to pay same, an assignment (prior to such payment) of a debt due by account from defendant to the assignor did not preclude defendant from establishing an equitable set-off; it appearing that the assignor was insolvent at the time he executed the note and when he assigned the account. This case is now cited as authority in behalf of the petitioning surety. That case was one that dealt with the rights of an indorser as against his principal, and the equity that supported

the set-off was found in the *insolvency of his own principal,* to whom the indorser stood as potential creditor at the time the account sued on was assigned, and the discussion and marshaling of authorities related almost wholly to a phase other than the one here presented—the *status* of a surety who on assignment date had not paid his principal's debt.

In the case at bar the surety's principal is solvent, and the effort is to have the *insolvency of the bank* constitute the equity in support of the remedy sought.

In the cited case, the account sought to be met by set-off was the principal's against the indorser, while in the case at bar the effort is that of a surety to set off her own demand against a debt that is primarily not hers, but the real debt of her principal, the son. It is manifest, on analysis, that the *Nolan Lumber Co. Case* is not authority for petitioner's contention, and could only be, by analogy, were it made to appear that the surety's principal was insolvent.

The bank's insolvency in instances would be reason for, and sustain, an equitable set-off; for example, in accelerating the maturity of demands, for equity's purposes in set-off. *Nashville Trust Co.* v. *Bank,* 91 Tenn., 336, 347, 18 S. W., 822, 15 L. R. A., 710.

The question here presented for determination, therefore, recurs: Is the surety on a note held by the receiver of an insolvent bank entitled to have set off against the same the amount of an individual deposit due the surety by the bank, when the bank is not suing, and the maker and primary obligor is solvent?

Chancellor Walworth in the early case of *In re Middle District Bank,* 9 Cow. (N. Y.), 414, note, said: "If the real debtor is unable to pay, and the receiver is compelled to resort to the indorser, who is eventually to be the loser, he has the same equitable claim to offset bills which he had at the time the bank stopped payment. But no such offset should be allowed to an indorser where he is indemnified by the real debtor, or when the latter can be compelled to pay."

In *Davis* v. *Industrial Manufacturing Co.,* 114 N. C., 321, 19 S. E., 371, 23 L. R. A., 322, it was said: "If it is true that the principal debtor, the Industrial Manufacturing Company, is wholly insolvent, and that the receiver will not be able to collect anything on this note from it, then the true debt of the defendant West [surety] to the bank is one-eighth part of the whole amount, and also his proper proportion of what his cosureties fail to pay; . . . and we hold that the receiver should be directed to adjust and settle the said true indebtedness of the defendant West by setting off the same against his aforesaid claims against the bank"—and the court proceeded to approve the ruling of Chancellor Walworth, quoted above.

In *Edmondson* v. *Thomasson,* 112 Va., 326, 71 S. E., 536, 26 Ann. Cas., 1301, it was said: "The partnership of Thomasson & Stembridge was the principal debtor. If Thomasson, as indorser, pays the debt in any way whatever by the application of the set-off in accordance with his petition or otherwise, he can indemnify himself by resort to the assets of the firm,

if it be solvent, or to the extent at least of any dividends to which he might be entitled upon a distribution of its assets. He would then be precisely within the terms of the principle stated by Chancellor Walworth. If, however, the partnership, which is the real debtor, be unable to pay, and the receivers are compelled to resort to the indorser, who individually would be the loser, he will be plainly entitled to set off his claim against the bank in satisfaction of any demand made by the receivers upon him as indorser''—and the petition for set-off was disallowed; the maker and real debtor being held to be solvent.

The same rule was announced in *New Farmers' Bank* v. *Young,* 100 Ky., 683, 39 S. W., 46.

It is apparent that, if the relief prayed by petitioning surety were granted, an inequitable result would be worked, against the rule above referred to. She would collect her entire claim through a process of obtaining credit on the note for an equivalent amount of her deposits; and, her principal being solvent, she would be in a position to realize from him the full amount thus paid as his surety. She would do this—not be paying her own debt to the bank, but, in contemplation of equity, the debt of another.

The rule laid down in the *Nolan Lumber Co. Case* and kindred authorities was meant to shield from loss indorsers and sureties by forcing their principals, the real debtors, to bear their own just burdens; not, as is asked here, to award the surety at her instance and prayer an affirmative advantage. In holding to the

contrary the supreme court of North Dakota, in *Clark* v. *Sullivan*, 2 N. D., 103, 49 N. W., 416, 13 L. R. A., 233, argued that "one of the very elements of law is that a surety is a favorite of a court of equity." So he is, for protection, not profit; certainly not to the extent of having awarded him by indirection a special privilege of preference over other creditors of the insolvent bank.

Let us assume that there had, in addition to the surety, been an indorser on the note, or an indorser for the accommodation of the surety, each with a deposit in the bank equal in amount to the note. How, and in what order, would the court award to them the privilege, evidently to be sought, of satisfying the debt with advantages consequent?

We deem the true rule to be that announced in the cases quoted, and that the petition for equitable set-off should be denied. The court of civil appeals reached a correct result, but on another line of reasoning. The decree of that court is therefore affirmed.

STAIR *v.* HESKA AMONE CONGREGATION *et al.**

(*Knoxville.* September Term, 1913.)

1. **REWARDS. Actions. Evidence. Efficient cause of arrest.**

Where a reward was offered for the arrest and delivery to the sheriff of a culprit, and a police officer, in searching for the culprit in reliance upon the reward, made the arrest, but the prisoner escaped, and on pursuit surrendered to plaintiff, who was in the front of the pursuit, the officer was the efficient cause of the arrest, and not plaintiff. (*Post*, *pp.* 192, 193.)

2. **REWARDS. Who may receive. Efficient cause of arrest.**

The rules governing the interpretation of ordinary contracts are to be applied in the construction of a published reward for an arrest or other service, and the better rule is that he who is the active and efficient cause in securing the result described in an offer of reward is the one entitled thereto. (*Post*, *p.* 193.)

Cases cited and approved: McClaughrey v. King, 147 Fed., 463; Haskell v. Davidson, 91 Me., 488.

3. **REWARDS. Who may receive. Police officer.**

A police officer is precluded by public policy from demanding or enforcing a reward for an arrest, but the fact that a reward was voluntarily paid an officer after notice that a private citizen claimed it does not enlarge the rights of such citizen, or entitle him thereto, where the officer, rather than he, was the efficient cause of the arrest. (*Post*, *p.* 194.)

4. **REWARDS. Who may receive. "Arrest."**

Where a citizen joined the pursuit of a prisoner, who had escaped from an officer, and the culprit surrendered to him while im-

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*The question of the effect of assistance of officers on right to reward for procuring arrest, is discussed in a note in 7 L. R. A. (N. S.), 217. And the authorities on the right of an officer to claim reward for arrest, are collated in notes in 11 L. R. A. (N. S.), 1170; 34 L. R. A. (N. S.), 924; and 43 L. R. A. (N. S.), 131.

mediate and continuous pursuit was being made by the officer and others, such action did not constitute a second arrest, and it was not an "arrest" within the meaning of an offer of reward. (*Post*, *p.* 194.)

Case cited and approved: Cooper v. Adams, 2 Blackf. (Ind.), 294.

5. REWARDS. Apportionment. Necessity of concert of action. Where there is no concert of action when the endeavor to gain a reward is entered upon, he alone is entitled to it who first substantially complies with the offer; and where a prisoner escaped from an officer, and in the pursuit surrendered to a citizen, there was no sufficient concert of action to entitle such citizen to a portion of the reward. (*Post*, *p.* 194.)

Case cited and approved: Stroud v. Garrison, 24 Ark., 53.

FROM KNOX.

Appeal from the Chancery Court of Knox County to the Court of Civil Appeals and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—WILL D. WRIGHT, Chancellor.

W. J. DONALDSON, for complainant.

REUBEN L. CATES, for defendants.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint was filed by Stair to recover a reward of $300, offered by defendant Congregation for the "arrest and delivery to the sheriff of Knox county" of one who had at night assailed and brutally beaten, in his store, one of its members, Schwarts, there being no other present.

The proof establishes that among those who with knowledge of, and in reliance on the reward, began to search or look out for the culprit, was one Johnson, of the city police force. This officer, observing a negro walking a street of his beat who appeared to him to answer the description given in the published reward, hailed him and engaged him in a conversation which tended to confirm Johnson's suspicions. The negro was thereupon arrested, and while being taken by Johnson to the city hall the prisoner struck down the officer and ran in an effort to escape. Johnson followed in pursuit as soon as he recovered his footing, shot twice at the prisoner, and cried aloud, "Catch him!" hearing which a large number of citizens joined in the pursuit, among them complainant, Stair. The negro dodged into a livery stable, passing out of the sight of Johnson, who continued to pursue, and went through same into Sullivan street. Stair entered the stable immediately behind the negro, leading the pursuers, drew his pistol, and commanded the negro to halt. Sullivan street at this place is a *cul de sac,* the only avenue of escape being into Jackson avenue, and there stood other pursuers. In this situation the negro surrendered to Stair. Policeman Johnson did not come up until the negro had been taken in charge by other policemen, who took him to jail. The court of civil appeals found as a fact that but for the intervention of Stair, or Stair and others, the negro probably would have escaped from Johnson, and that in

the surrender in Sullivan street Stair was proximately and efficiently instrumental.

Stair sues for the full reward, and was granted by the chancellor a recovery of $100, by way of apportionment for services contributed. The court of civil appeals on appeal denied him any relief, save costs, which were taxed against defendant Congregation. Both sides have petitioned for writs of *certiorari*.

The rules governing the interpretation of ordinary contracts are to be applied in the construction of the published reward; and, however this offer may be conceived of, this policeman, and not Stair, substantially performed the service requisite legally to a demand of the reward, had he not been precluded by public policy which denies such relief to a regular officer. If from the facts, known to the Congregation and to those seeking to earn the reward, detective skill, initiative, and ingenuity in the discovery of the culprit was primarily demanded, or if, on the other hand, great danger was to be anticipated in the actual arrest, and the reward, therefore, construed to be paid to him who should brave the danger and effect the capture, Johnson earned the reward.

"The better rule is that he who is the active and efficient cause in securing the result described in an offer of reward is the one entitled to it. He is the one who accomplishes the result—who brings it about. It is not the man who, when all else is done, and when the accused is, as it were, tied to a stake, merely performs the letter of the final act without effort, skill,

or enterprise. Such rule would conform to the spirit that actuated the offer of reward, and if it does it is the one that should prevail.'' Hook, circuit judge, in *McClaughrey* v. *King*, 147 Fed., 463, 79 C. C. A., 91, 7 L. R. A. (N. S.), 216, 8 Ann. Cas., 856; *Haskell* v. *Davidson*, 91 Me., 488, 40 Atl., 330, 42 L. R. A., 155, 64 Am. St. Rep., 254, and other cases cited; 34 Cyc., 1747.

The act of Stair contributing to the second surrender was not an ''arrest'' within the meaning of the offer of reward. The arrest had been made by Johnson and the mere retaking of the culprit in his attempted escape, while immediate and continuous pursuit was being made, did not constitute a second arrest, or affect Johnson's right to the prisoner under the one effective arrest. *Cooper* v. *Adams*, 2 Blackf. (Ind.), 294; 2 Hale, P. C., 115; 3 Cyc., 898.

The chancellor was in error in decreeing complainant $100 on apportionment, since his right to so share in the reward depends upon there having been concert of action between him and Policeman Johnson when the endeavor was entered upon. Where there is no such concert as to joint efforts, he alone is entitled to the reward who first substantially complies with the terms of the offer. *Stroud* v. *Garrison*, 24 Ark., 53; 24 Am. & Eng. Ency. Law (2 Ed.), 959. Complainant, Stair, was brought into the chase by hearing Johnson's cry, ''Catch him!'' and not as an independent searcher.

The court of civil appeals was in error in decreeing complainant his costs, whether of the court below or

on appeal, against the Congregation. That body voluntarily paid the police officers concerned in the transaction, without legal liability to do so, and after notice of complainant's claim; but those facts cannot cure his own lack of legal right or constitute an equity to that end.

Decree of court of civil appeals modified accordingly, and affirmed.

SOUTHERN OPERATING CO. *v.* CITY OF CHATTANOOGA *et al.*

(*Knoxville.* September Term, 1913.)

1. **APPEAL AND ERROR. Scope of review. Pleading. Demurrers.**

While ordinarily a demurrer bad in part must be overruled altogether, the supreme court, since the enactment of the statute allowing appeals from decrees overruling demurrers, may, when the decision would greatly narrow the litigation, depart from that rule and determine the propriety of one ground of demurrer, though another ground is bad. (*Post*, *pp.* 200, 201.)

Cases cited and approved: Riddle v. Motley, 69 Tenn., 468, 473; Phoenix Insurance Co. v. Day, 72 Tenn., 247, 249; Puckett v. Richardson, 74 Tenn., 49, 65; Berry v. Wagner, 81 Tenn., 591, 599; Ballentine v. Mayor, 83 Tenn., 633, 650.

2. **MUNICIPAL CORPORATIONS. Ordinances. Reference.**

Where a municipal ordinance referred by number to chapter 593 of the Acts of the General Assembly for 1909, and there was no such numbered chapter in the published acts, that part of the reference must be treated as wholly nugatory, but it will not impair the validity of the ordinance if there is sufficient otherwise to identify the act intended to be incorporated. (*Post*, *pp.* 201, 202.)

Acts cited and construed: Acts 1909, ch. 479.

Cases cited and approved: Napa v. Easterly, 76 Cal., 222; Kreulhaus v. City of Birmingham, 164 Ala., 623; Richards v. Town of Magnolia, 100 Miss., 249; Dismukes v. Town of Louisville, 101 Miss., 104.

3. **MUNICIPAL CORPORATIONS. Ordinances. Reference to statutes.**

A city ordinance declared that each vocation, occupation and business named in chapter 593 of the Acts of the General Assembly for 1909, known as the "Revenue Bill," should be a

privilege within the city, and the rate of taxation on such privileges should be the same for the city for the fiscal year as provided in the revenue bill. The Acts of 1909 contained no chapter 593, but chapter 479, entitled "An act to provide revenue for the State of Tennessee and the counties and municipalities thereof," provides in section 4 that each occupation thereinafter named shall bear a certain tax, and thereafter enumerates various taxable occupations. *Held*, that as no person reading the ordinance and Acts of 1909 could fail to find the statute in question, it was properly incorporated into the ordinance by reference; incorporation by reference being recognized in case of deeds where the description may be so incorporated and in case of ordinances so far as the inclusion of directions and specifications (*Post*, *p.* 204.)

4. MUNICIPAL CORPORATIONS. Ordinance. Reference.

The Chattanooga ordinance, which in fixing privilege taxes upon occupations attempted by reference to incorporate the Revenue Act of 1909, is not rendered invalid because sections 5 and 7 of the act referred to a class of privileges over which municipal corporations could not have any control, because the tax is required to be paid directly to the State; for the purpose of the ordinance was obviously to confine its application to those forms of privilege which were open to municipal taxation. (*Post*, *pp.* 204, 205.)

Acts cited and approved: Acts 1909, secs. 4, 5, 7.

5. MUNICIPAL CORPORATIONS. Ordinances. Reference.

Where a municipal ordinance incorporates by reference a general statute, the statute in its entirety need not be set out in the ordinance or entered upon the minutes of the corporation. (*Post*, *pp.* 204, 205.)

6. COMMERCE. Interstate commerce. Burden upon.

An occupation tax may be imposed upon one engaged in the sale of liquors, though all of his purchases and all of his sales are made without the State, without imposing a burden on interstate commerce; his business being situated within the State. (*Post*, *p.* 206.)

Cases cited and approved: Logan v. Brown, 125 Tenn., 209; Southern Operating Co. v. Hays, Ms., Knoxville, September term.

FROM HAMILTON.

Appeal from Chancery Court, Hamilton County.—T. M. McConnell, Chancellor.

Coleman Frierson, for appellants.

Littleton, Littleton & Littleton, Williams & Lancaster, and Pritchard, Allison & Lynch, for appellee.

Mr. Chief Justice Neil delivered the opinion of the Court.

The bill in this case was filed to enjoin the collection of a privilege tax which it is alleged the city was about to collect from complainant as a liquor dealer.

Three grounds of relief are stated: Firstly, that complainant, although engaged in the sale of liquor and having its place of business within the city of Chattanooga, makes all of its purchases outside of the State of Tennessee, and likewise sells only to persons beyond the borders of the State, has so conducted its business from the start, and will continue this method of business; therefore that it is engaged wholly in interstate commerce and is protected by the commerce clause of the Constitution of the United States, and that the tax in question would impair its rights there-

under. Secondly, that the ordinance is fatally defective in that it is fatally uncertain, because it purports to make specific the tax to be imposed by reference merely to an act of the legislature of the State of of Tennessee by the number of the chapter, when there is no such number, and by designation as the "Revenue Bill" when there is no bill so known in the Acts of 1909. Thirdly, that if the reference should be held good, still inasmuch as the law requires ordinances to be recorded, and the matter referred to was not recorded on the minutes of the corporation, the ordinances would be void for that reason.

There are two ordinances set forth in the bill. The first reads:

"Ordinance No. 1351.

"An ordinance fixing the rate of privilege taxation in the city of Chattanooga, for the fiscal year beginning October first, 1911, and ending September 30, 1912.

"Section 1. Be it ordained by the board of commissioners of the city of Chattanooga, that each vocation, occupation, and business named in chapter 593 of the Acts of the General Assembly of the State of Tennessee, for 1909, known as the Revenue Bill, be, and the same is hereby declared to be a privilege in the city of Chattanooga, and the rate of taxation on such privileges shall be the same for said city for the fiscal year beginning October 1, 1911, and ending Sepember 30, 1912, as provided in said State Revenue Bill.

"Sec. 2. Be it further ordained that this ordinance take effect two weeks from and after its passage, the public welfare requiring it."

The second ordinance is numbered 1401, and is worded like the one already copied except that it undertakes to provide for the fiscal year beginning October, 1912.

There was a demurrer to the bill containing two grounds. The first makes the point, in substance, that under the facts stated the complainant is liable for the tax which the city is endeavoring to collect from it.

The second ground is that, under the facts stated, there was no fatal uncertainty in the ordinances, and that they are valid.

The chancellor overruled both grounds of demurrer, but under our statute applicable to the subject granted an appeal to this court.

It is first insisted that each of these grounds of demurrer, while in terms addressed to the whole bill, if good at all, could be applicable only to separable parts thereof; hence they were properly overruled under the general rule that demurrers not good to the whole bill, when addressed thereto, are bad even if good to a part only. Without undertaking to determine whether the demurrers are properly characterized we think this is a case for the application of an exception to the general rule which has been established in this State. It is said in *Riddle* v. *Motley*, 1 Lea, 468, 473, that while the settled rule of chancery practice that a demurrer bad in part must be overruled alto-

gether has always been recognized in this State, yet since the passage of the statute granting appeals from decrees or judgments overruling demurrers, the court has occasionally felt at liberty to so far depart from the rule as to determine questions involved when the decision would greatly narrow the litigation and it was greatly to the interest of the parties. This exception has been followed and confirmed in subsequent cases. *Phoenix Insurance Co.* v. *Day,* 4 Lea, 247, 249; *Puckett* v. *Richardson,* 6 Lea, 49, 65; *Berry* v. *Wagner,* 13 Lea, 591, 599; *Ballentine* v. *Mayor,* 15 Lea, 633, 650.

It would be idle, in the present case, to send the parties back to the chancery court on a mere technical defect in the form of the presentation of the demurrers, when the points involved have been as fully discussed by counsel as if they had been presented with the highest technical accuracy.

Coming now to the merits of the questions involved, we shall first consider that one which presents the point that the ordinance is fatally defective for uncertainty.

There is no chapter bearing the number 593 in the published Acts of the General Assembly for the year 1909. That part of the reference must therefore be treated as wholly nugatory, but under the maxim, "*Falsa demonstratio non nocet,*" this reference can do no harm if there is sufficient otherwise to identify the act intended to be incorporated. Turning to the Acts of 1909 we find a chapter numbered 479, the caption of which is: "An act to provide revenue for the State of

Tennessee and the counties and municipalities thereof." Section 4 reads: "That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk as provided by law for the collection of revenue." Then follows a list of occupations with their appropriate tax, covering 24½ pages of the book. There is no other act in the volume upon the same subject, or which by any possibility could be mistaken for it, or to which reference could have been made. It is beyond doubt that anyone reading the ordinances copied, and examining the Acts of 1909 to find the revenue bill called for, would inevitably light upon the act above mentioned, and on no other. So, if it be permissible to incorporate matter into an ordinance by reference, no other conclusion can be reached than that the reference was sufficient to save the ordinance from the charge of uncertainty, since section 4 of the act referred to contained full and ample provisions on the subject of privilege taxes assessed against liquor dealers. That such reference is proper under the maxim, "*Id certum est quod certum reddi potest,*" is perfectly clear. It constantly occurs in statutes and in deeds, and we can see no exception to it when applied to municipal ordinances. It has often been so applied. It has been held that ordinances establishing grades of streets may properly refer to maps and books on file in a public office as part thereof (McQuillan on

Municipal Ordinances, sec. 137, note 9, citing *Napa* v. *Easterby,* 76 Cal., 222, 18 Pac. 253), also that a prior ordinance may be incorporated in a subsequent ordinance and be carried forward by appropriate language (Id., note 10, citing *Baumgartner* v. *Hasty,* 100 Ind., 575, 586, 50 Am. Rep., 830). See, also, section 545 of the same book, and cases cited thereunder.

The practice has also been recognized in the following cases, which discuss general ordinances purporting to cover by reference a body of municipal offenses: *Kreulhaus* v. *City of Birmingham,* 164 Ala., 623, 51 South., 297, 26 L. R. A. (N. S.), 492, and cases cited therein; *Richards* v. *Town of Magnolia,* 100 Miss., 249, 56 South., 386; *Dismukes* v. *Town of Louisville,* 101 Miss., 104, 57 South., 547. However, in *Kreulhaus* v. *City of Birmingham,* the ordinance was held void because it made no distinction between offenses applicable to municipal corporations and others included within the general description which could not possibly apply to such corporations. This was deemed to make the ordinance fatally uncertain. In *Dismukes* v. *Town of Louisville,* the ordinance was held bad because the general description by reference covered felonies as well as misdemeanors, whereas under the law of the State the town had no authority over felonies. In *Richards* v. *Magnolia* the reference was held good, and the ordinance good, because it confined the power of the city only to misdemeanors of which it was given jurisdiction under the State laws.

So, stopping with section 4 of the Revenue Act of 1909, we think there could be no doubt that the reference was proper, and sufficiently definite. Section 5, however, refers to a class of privileges over which municipal corporations could not possibly have any control, because the act provides that the privilege tax for the kinds of business falling under that section should be paid directly to the comptroller of the treasury of the State, which necessarily excluded both municipal corporations and counties. The same is true of the business of building and loan associations provided for in section 7. The existence of these two sections would, on first view, bring the case within the principle as to uncertainty declared in two of the cases above referred to. We are of the opinion, however, that this result does not follow, because anyone referring to the act for ascertainment of the legislative purpose could not fail to conclude that the intention of the ordinance was to confine its application only to those forms of privilege which were open to municipal corporations under the terms of the act itself. The ordinance referring to the act for authority could not, with any show of reason, be supposed to have included specific items appropriated to the State alone. Under *Dismukes* v. *Louisville* the court held that the intention was to include felonies, and in *Kreulhaus* v. *Birmingham* it was held that the intention was to cover both crimes over which the corporation might have jurisdiction, and those over which it could not have such jurisdiction. Here the case is different, because the

reference is to a specific act, in connection with and in subordination to which the ordinance must be construed; and, so construing it, we are of the opinion, as stated, that the only possible solution is that the purpose was to include only those privileges that were open on the face of the act to municipal corporations; that the city could not have intended to include privilege taxes especially withholden from cities and counties, and devoted altogether to the use of the State.

In disposing of the above matters we have recognized as sound the rule laid down in the cases of *Kreulhaus* v. *City of Birmingham* and *Dismukes* v. *Town of Louisville*, but we are inclined to the opinion that it would have no application to an ordinance in which the improper matters could be clearly distinguished and separated from those properly embraced. The inclusion of matters distinctly beyond the competency of a municipality ought not to be treated as beclouding those as clearly within that competency, or as making the ordiance uncertain. Things indubitably incompetent, and in themselves perfectly certain, should simply be treated as expunged, or nonexistent.

It is insisted for complainant that at all events there was no proper recordation of the ordinance because it did not set out within its body the act of 1909 *in totidem verbis*, and enter it upon the minutes of the corporation. We think this is a view altogether too strict. According to this there could be no registration of a deed which described the land conveyed by reference to another instrument, unless the contents of such

instrument should be bodily transported into the last deed. No one would contend for such a rule as to deeds, yet they are required to be as certain as ordinances.

As to the point that the complainant is not subject to a privilege tax because protected by the commerce clause of the constitution, this is fully covered by *Logan* v. *Brown*, 125 Tenn., 209, 141 S. W., 751, and the federal cases therein cited. The same point was involved in the case of *Southern Operating Co.* v. *Hays*, Ms., Knoxville, September term, 1912, and was decided in the same way. That case is now pending in the Supreme Court of the United States on writ of error, and we need not further discuss the question.

It results that the judgment of the chancellor overruling the demurrer is reversed, the demurrer sustained, and the bill dismissed with costs.

MAHONEY-JONES CO. *et al.* *v.* SAMS BROS. *et al.**

(*Knoxville.* September Term, 1913.)

1. **FRAUDULENT CONVEYANCES. Judgment. Creditor's suit. Issues, proof, and variance.**

In a suit against a purchaser of a stock of goods who failed to comply with the Bulk Sales (Laws 1901, ch. 133), relative to ascertaining and notifying the creditors of the seller, a variance between the bill describing plaintiff as a creditor of a firm of which the seller was a member and the evidence showing that it was an individual creditor of the seller was immaterial; no relief being sought against the partnership, and the partnership having no assets. (*Post*, *p.* 210.)

Cases cited and approved: House v. Thompson, 40 Tenn., 512; Pennington v. Bell, 36 Tenn., 200; Jackson Insurance Co. v. Partee, 56 Tenn., 296; Fowlkes v. Heirs and Creditors of Bowers, 79 Tenn., 144, 146.

Acts cited and construed: Act 1789, ch. 57.

Code cited and construed: Sec. 4486 (S.).

2. **PARTNERSHIP. Liability for firm debts.**

Partnership debts are several as well as joint, and each member of the firm is individually liable therefor, especially in view of Shannon's Code, sec. 4486, providing that all joint obligations and promises are joint and several. (*Post*, *p.* 210.)

3. **FRAUDULENT CONVEYANCES. Sales in bulk. Statutory provisions.**

Under the Bulk Sales Law (Laws 1901, ch. 133), providing that, where any portion of a stock of merchandise is sold other-

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*As to the remedy of creditors where sale is made in violation of bulk sales law, see note in 39 L. R. A. (N. S.), 374.

For a collection of the authorities on statutory requirements on sale of stock of goods in bulk, see note in 2 L. R. A. (N. S.), 331.

wise than in the ordinary course of trade, the sale shall be presumed fraudulent and void as against creditors of the seller, unless the purchaser shall make inquiry of the seller as to his creditors, and shall notify them personally or by registered mail of the proposed sale, upon a sale of merchandise in bulk by an individual, creditors of a partnership of which he was a member were entitled to notice. (*Post*, *p.* 211.)

Case cited and disapproved: Whitehouse v. Nelson, 43 Wash., 174.

Cases cited and approved: People's Saving Bank v. Van Allsburg, 165 Mich., 524; Daly v. Sumpter Drug Co., 127 Tenn., 412.

4. COURTS. Rules of decision. Decisions of courts of other States.

While a construction given to a foreign statute closely similar to one of this State is useful and to be accorded reasonable consideration, it is in no sense authoritative, nor is it as persuasive as a deliverance of the same court upon the common law, since each sovereignty must construe its own statute. (*Post*, *p.* 212.)

5. FRAUDULENT CONVEYANCES. Sales in bulk. Statutory Provisions.

Under the Bulk Sales Law (Laws 1901, ch. 133), providing that a sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade shall be presumed fraudulent and void as against the creditors of the seller, unless the requirements of that act are complied with, a sale of goods separated from a stock of merchandise to the value of about one-half of the whole stock, without a compliance with the statute, was a violation thereof. (*Post*, *p.* 211.)

6. FRAUDULENT CONVEYANCES. Sales in bulk. Statutory provisions.

Under such statute, where a purchaser of merchandise in bulk intermingled the goods with other goods, making them practically indistinguishable, he was liable directly to creditors

of the seller for their value, without the necessity of attaching them. (*Post*, *p.* 211.)

Case cited and approved: Daly v. Sumpter Drug Co., 127 Tenn., 412.

FROM CARTER.

Appeal from Chancery Court, Carter County.—HAL H. HAYNES, Chancellor.

ALLEN & CLARK, for complainants.

JOHN H. TIPTON, for defendants.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

E. G. Sams, being the owner of a small stock of goods at Elkanah, in Carter county, separated from that stock certain goods to the value of about one-half of the whole stock, and sold these to defendant B. M. Brumit, in payment of a debt which the latter held against Sams Brothers, a firm of which E. G. Sams had been a member. At the time the sale was made this firm was out of business, and had no property. The provisions of our Bulk Sales Law (Laws 1901, ch. 133) were not complied with. Brumit intermingled the goods he had so purchased with his other goods in such way that they could not be distinguished. The present suit was brought by Mahoney-Jones Company, an individual creditor of E. G. Sams, and the Standard Grocery Company, a creditor of the firm, to hold

Brumit liable for the value of the goods so purchased. The chancellor granted the relief sought, and the court of civil appeals affirmed the judgment. The case is here on *certiorari* to the latter court.

The first defense made is that the bill describes the Mahoney-Jones Company as a creditor of the firm, while the evidence shows it was only an individual creditor of defendant E. G. Sams, hence that there is a fatal variance between the *allegata* and the *probata*. The variance is immaterial in the present case, because no relief is sought against the partnership, and each member of the firm is individually liable for the debts of the firm; partnership debts being in this State several as well as joint. *House* v. *Thompson,* 3 Head, 512; Act 1789, ch. 57; Shan. Code, sec. 4486. The firm having no assets, the question does not arise of settling equities between firm creditors and individual creditors in respect of partnership property or individual property under the principles laid down on that subject in *Pennington* v. *Bell,* 4 Sneed, 200, *Jackson Insurance Co.* v. *Partee,* 9 Heisk., 296, and *Fowlkes* v. *Heirs and Creditors of Bowers,* 11 Lea, 144, 146.

The next defense is that in no aspect of the case can the Standard Grocery Company have relief, inasmuch as it is a firm creditor, and our Bulk Sales Law does not require notice to be given to creditors of that class on sale of an individual stock of goods owned by one member of such firm. The principle stated in the last paragraph as to the several charac-

ter of partnership obligations fully meets this contention. The same result is reached from a consideration of the language of the statute itself. It requires the purchaser to make "full, explicit inquiry of the seller as to the names and places of residence or place of business of *each and all* of the creditors of the seller," and requires him to notify "*each of the creditors* of the seller of whom the purchaser has knoweldge, or can with reasonable diligence acquire knowledge." The act provides that the sale shall be presumed to be fraudulent and void as against "*the creditors of the seller,* unless," etc. The statute is reproduced in *Daly* v. *Sumpter Drug Co.*, 127 Tenn., 412, 155 S. W., 167.

We are referred to *Whitehouse* v. *Nelson*, 43 Wash., 174, 86 Pac., 174, as announcing a different rule from that stated herein. That case holds that, under the Washington statute, on sale of a stock in bulk by a firm it is not necessary to give notice to the individual creditors of the members of the firm. On the contrary, in *People's Savings Bank* v. *Van Allsburg*, 165 Mich., 524, 131 N. W., 101, it is held, construing the Michigan statute (Pub. Acts 1905, No. 223), that notice must be given to all creditors. In that case the special question was whether the statute meant mercantile creditors only. Construing the language "the creditors of the seller," and "upon application of any of the creditors," and upon compliance shall not be liable to "any of the creditors," the court held that the intention was to embrace all creditors of the seller. We

have no copy of the Washington statute, and are therefore unable to compare the construction given to that statute with the construction herein given to our own. Therefore the decision cannot assist us in any degree.

We may add, which is indeed but a truism, that, while a construction given to a foreign statute closely similar to one of our own is undoubtedly useful as the opinion of learned persons on the meaning of ascertained language, and therefore to be accorded respectful consideration, it is in no sense authoritative, nor is it as persuasive as a deliverance of the same court upon the common law. Each sovereignty must construe its own statutes.

It is not doubted, nor indeed can be, that the sale of half of a stock of goods is a violation of the law in question, and that the purchaser is liable directly to creditors for the value of the goods, without the necessity of attaching them, when he has intermingled them with other goods, thereby making them practically indistinguishable. *Daly* v. *Sumpter Drug Co.*, supra.

There is no error in the judgment of the court of civil appeals, and it is accordingly affirmed.

MARQUET *v.* AETNA LIFE INS. CO.*

(*Knoxville.* September Term, 1913.)

1. INSURANCE. Insurable interest. Date of termination.

Where a life insurance policy for a term of ten years provided that at the expiration of the term a new policy for an equal amount would be issued without medical re-examination, subject to the premium for the age then attained by insured, providing the expiring policy was returned to the company, and that the surplus under the expiring policy would be applied to reduce the premium on the new policy to the rate charged in the first policy, a rider attached to the policy at the expiration of the term, providing that, the surplus having been found sufficient to reduce the premium during the ensuing term of ten years to the amount named as premium in the policy, it was unnecessary to return the policy for the issue of a new policy until the expiration of ten years from the date of the rider, provided the premium was paid and that all the other conditions, provisions, and requirements of the policy continued in force, extended the obligations of the company for an additional ten-year term, and made the original policy operative for twenty instead of ten years, and therefore the beneficiary's insurable interest was to be tested as of the date of the original contract and not as of the date of the rider. (*Post*, *pp.* 218, 219, 220.)

Case cited and approved: First Nat'l Bank v. Guaranty Co., 110 Tenn., 25.

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*As to the wife's right to insure the life of her husband, see note in 53 L. R. A., 817.

On the question of the power of insured to destroy rights of beneficiary, see note in 49 L. R. A., 737.

The authorities on the question of the presumption as to death of former spouse, are treated in notes in 14 L. R. A., 542, and 16 L. R. A. (N. S.), 105. And upon the necessity of inquiry to raise presumption of death from seven years' absence, see notes in 2 L. R. A. (N. S.), 809, and 28 L. R. A. (N. S.), 178.

Case cited and disapproved: Life Insurance Co. v. Galbraith, 115 Tenn., 471.

2. INSURANCE. Insurable interest. Husband and wife.

A husband and wife have each a reciprocal insurable interest in the life of the other. (*Post*, *p.* 222.)

Case cited and approved: Conn. Mutual Life Ins. Co. v. Schaefer, 94 U. S., 457.

3. INSURANCE. Construction. Rights of beneficiaries.

Where a life insurance policy was made payable to insured's wife, or in the event of her death before that of insured to his heirs, executors, administrators, or assigns, her rights were so far vested that they could not, during her life, be divested without her consent. (*Post*, *p.* 222.)

Cases cited and approved: Gosling v. Caldwell, 69 Tenn., 455; Trust Co. v. Bank, 123 Tenn., 625.

4. INSURANCE. Proceeds. Wife's separate estate.

Where an insurance policy was made payable to insured's wife, delivered to her, and she paid the premiums thereon, this was a settlement by the husband upon the wife, and created in her a separate estate. and the company therefore properly treated her as having the sole right of disposition of the surplus created by the premiums. (*Post*, *pp.* 222, 223.)

Case cited and approved: Hughey v. Warner, 124 Tenn., 726.

5. INSURANCE. Insurable interest. Necessity.

A lack of insurable interest by the beneficiary in the life of the insured, where the insurance is taken out and paid for by the beneficiary as a speculation, vitiates the contract, especially in view of Acts, 1895, ch. 160, sec. 2, as amended by Acts 1899, ch. 31, defining a contract of insurance as an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the insured upon the destruction or injury, loss or damage, of something in which the other party had an insurable interest, and Shannon's Code, sec. 3159, providing that all contracts founded in

whole or in part on a gambling or wagering consideration shall be void to the extent of such consideration. (*Post*, *p.* 223.)

Cases cited and approved: Bendet v. Ellis, 120 Tenn., 277; Conn. Mutual Life Ins. Co. v. Schaefer, 94 U. S., 457.

Code cited and construed: Sec. 3159 (S.).

6. **INSURANCE. Insurable interest. Husband and wife. Effect of divorce.**

A life insurance contract naming insured's wife as beneficiary, was not invalidated by the subsequent divorce of the husband and wife. (*Post*, *p.* 224.)

Cases cited and approved: Conn. Mutual Life Ins. Co. v. Schaefer, 94 U. S., 457; Snyder v. Mystic Circle, 122 Tenn., 248.

7. **DEATH. Presumption from absence.**

Where a wife procured a divorce and the decree enjoined the husband from attempting to have any relations with her or the minor children, and he thereafter left C., where his wife and children resided, and for some time resided in O., which place he subsequently left, evidence that he had not been heard from in C. by any member of his immediate family or others for seven years, with no evidence as to any inquiry made concerning him at O., his last known place of residence, was insufficient to raise a presumption of death. (*Post*, *pp.* 225, 226, 227.)

8. **EVIDENCE. "Presumption." What constitutes.**

A "presumption" is a conclusion reached by means of the weight of proven circumstances, and before it can exist the circumstances which attend must be in evidence. (*Post*, *p.* 225.)

Cases cited and approved: Dunlap v. State, 126 Tenn., 415; Davie v. Briggs, 97 U. S., 628; Renard v. Bennett, 76 Kan., 854; Modern Woodmen of America v. Gerdom, 72 Kan., 391; Miller v. Sovereign Camp Woodmen of the World, 140 Wis., 505; Hansen v. Owens, 132 Ga., 652; Hitz v. Ahlgren, 170 Ill., 63; Puckett v. State, 33 Tenn., 356; Shown v. McMackin, 77 Tenn., 601; Bank v. White, 114 Tenn., 73, 84.

9. **EVIDENCE. Circumstantial evidence. Weight and sufficiency.**

Proof of an essential fact must be had either direct or positive by witnesses who know the fact, or circumstantial by witnesses who know and testify to facts which tend to establish or prove the essential fact, and only when the circumstances are, in the judgment of the court or jury, such as usually or necessarily attend the essential fact are they sufficient in law to warrant a verdict; judgment or decree establishing a fact which has not been proved by direct or positive evidence. (*Post*, p. 225.)

FROM HAMILTON.

Appeal from Chancery Court, Hamilton County.—T. M. McConnell, Chancellor.

Pritchard, Allison & Lynch, for appelant.

Sizer, Chambliss & Chambliss, for appellee.

Mr. Justice Buchanan delivered the opinion of the Court.

This suit is based upon an insurance contract. The breach relied on is the failure to pay $2,000, the amount of the policy, upon proofs of death of the insured.

The defenses are two: First, that the payee or beneficiary in the policy sued on, at the date of its issuance, had no insurable interest in the life of the insured, and the contract sued on is therefore a wagering one and unenforceable; second, that the proofs

do not show the death of the insured, and therefore no breach is shown justifying a recovery.

There was a decree below for $2,132.50 and costs, from which the insurance company appealed, and has here assigned errors based on the defenses above.

At the time of the issuance of the policy sued on, complainant was the lawful wife of Gus Marquet, and his was the life insured. The policy was issued April 7, 1893, and soon thereafter it was delivered to complainant, who paid all premiums which became due upon it after its issuance. Three years and over after its issuance on, to wit, April 21, 1898, at the suit of complainant, she was granted an absolute divorce from Gus Marquet by the chancery court of Hamilton county upon the ground of habitual drunkneness by Gus Marquet after his marriage to her, failure by him to provide for her and her children by him, etc. There followed an entire estrangement between Gus Marquet and complainant and her children. The latter were two sons, respectively, about twenty-one and twenty years of age, and a daughter about eighteen years old at the time of the divorce. The children were in sympathy with the mother in that suit.

Prior to the divorce, for many years, the home of the family and of Gus Marquet had been in Chattanooga, Tenn., but soon after the divorce, or during the years 1898 or 1899, he left Chattanooga, and took up his residence at Oakdale, Tenn., where he remained until about the year 1900, when he left Oakdale for a trip to New Orleans, and has not, as complainant in-

sists, been heard from directly since that time, except through a letter supposed to have been from him, addressed to one of his nephews residing in Chattanooga in the year 1904. By one rumor he is said to have been seen in Detroit, Mich., by another in Memphis, Tenn., but the persons said to have seen him are not examined as witnesses; nor do the dates appear when they claim to have seen him.

The policy in suit, by its terms, was to live for a period of ten years from its date, in consideration of a fixed semiannual premium to be paid the company. But it provided that at its expiration it might be renewed by the issuance of a new policy, as follows:

"Sec. 2. At the expiration of the term of ten years under this policy and others of a similar form which may be issued to succeed it, said company will issue a new one of an equal amount without medical re-examination, subject to the premium for the age then attained by the insured, providing such expiring policy is returned to the office of the company for this purpose before its expiration, and the surplus under the latter will be applied toward reducing the premium in the new one to the rate charged in the first policy; but, should such surplus be insufficient to reduce the premium to said rate, it shall be optional with the insured to pay the premium required for the said new policy after the surplus from the expiring one has been applied, or reduce the amount of the insurance and continue previous payments. The said new policy will be dated and the first premium there-

on become due at the expiration of the term of the last preceding policy, and will be written for a term of ten years from such date, unless the insured has attained the age of seventy, in which case the new policy will be written for the remainder of life."

The policy sued on was never renewed by the issuance of a new one, as provided by section 2 above set out, but on the last day of its life as originally written, its life was prolonged or extended by agreement between complainant and the company by attaching to the policy sued on and originally issued what is called a "rider" signed by one of the officers of the company, thereunto authorized in the following words and figures:

"Form No. 222.

"M. G. Burkeley, Pres.

"J. L. English, Secy. H. W. St. John, Actuary.

"Frank Bushnell, Agency Secy. C. E. Gilbert, Ass't Sec'y.

"Aetna Life Insurance Company.

"Hartford, Conn., April 7, 1903.

"Renewable-Term Policy No. 216,338. issued by the Aetna Life Insurance Company, on the life of Gus Marquet, having this day completed a term of ten years, and the surplus existing under it having been found sufficient to reduce the tabular premium for the present age during the ensuing term of ten years to the amount named as premium in said policy, there-

fore it is unnecessary to return said policy for the issue of a new policy until the expiration of ten years from the date of this instrument, provided the premium expressed in said policy continues to be paid in each and every year before five o'clock p. m. of the days therein named for such payment, and that all the other conditions, provisions, and requirements of said policy continue in force.

"J. L. English, Secretary.

"Nash."

If there had been a renewal under section 2, the old policy would have been returned to the office of the company before its expiration, to the end that the company might issue a new one. This was not done. Complainant retained the old policy, and the company sent the rider to be attached to the old policy. Moreover, by the plain terms of the rider, the company waives the return of the old policy, and prolongs its life, or makes it the measure of rights between complainant and the company for ten years from the date when it would otherwise have expired. The legal effect of the rider was to make the original policy operative for twenty instead of ten years from its date.

A question much similar in some respects to the one here was presented to this court in *First National Bank* v. *Guaranty Co.*, 110 Tenn., 25, 75 S. W., 1080, 100 Am. St. Rep., 765, where it was said:

"Now, it is true that the renewal certificate is a new contract, but it is only a new contract as respects time; that is to say, it extends the indemnity provided

by the old contract to a new period of time—May 1, 1899, to May 1, 1900. The parties themselves understood there was only one bond and one penalty."

The question in the present case is clearly distinguishable from that presented to the court in *Life Insurance Co.* v. *Galbraith,* 115 Tenn., 471, 91 S. W., 204. There the insurance company defended upon the ground that the insured had made fraudulent misrepresentations in respect of his health, in an application to the company to reinstate a policy which had lapsed on account of his failure to pay a premium, and this court held:

"By his failure to comply with the condition upon which it could be kept alive he has *ipso facto* forfeited all rights under the policy. As to him, it is as if it had never been written. If any benefit accrue to him therefrom, it must be revitalized, and this can be done only with the consent of the company. When it is done, then it becomes a new assurance—a new contract—as if the policy then was for the first time issued," etc.

But in the present case, there was no forfeiture during the first ten years of the policy sued on. All the premiums called for by it were paid at maturity; and out of these a surplus was created in favor of the beneficiary sufficient to reduce the premium required by the company during the second term of ten years, even considering the ten years increase in the age of the insured, to the same amount, semiannually, as was required during the first ten-year period.

Upon the issuance of the policy for the first ten-year period, the complainant, then being the wife of the insured, had an insurable interest in his life. Husband and wife, beyond all question under the authorties, have each a reciprocal insurable interest in the life of the other. *Conn. Mutual Life Ins. Co.* v. *Schaefer*, 94 U. S., 457, 24 L. Ed., 251; Cooley's Briefs on the Law of Insurance, 185, and cases cited.

The policy as originally issued was payable to complainant, or, in the event of her death before that of the insured, to his heirs, executors, administrators, or assigns; and, under it, her rights were so far vested that they could not, during her life, be divested without her consent. *Gosling* v. *Caldwell*, 69 Tenn. (1 Lea), 455, 27 Am. Rep., 774; *Trust Co.* v. *Bank*, 123 Tenn., 625, 134 S. W., 311.

Though the insurance evidenced by the policy had been originally accomplished by a contract between the company and Gus Marquet, yet it is clear upon this record that he, she, and the company regarded that transaction as a settlement upon his wife of the proceeds of that contract whatsoever they might be, for he delivered the policy to his wife; she paid the premiums upon it; and the company, with knowledge of the facts, by the extension contract, treated with and recognized her as having the sole *jus disponendi* of the surplus which had been created by the payments she had made during the first ten-year term. The company was clearly well warranted in so treating with her. The contract was a settlement by the hus-

band upon the wife, and created in her a separate estate. *Hughey* v. *Warner*, 124 Tenn., 726, 140 S. W., 1058, 37 L. R. A. (N. S.), 582, and cases there cited.

The policy covering the first ten years was not extinct or discharged so far as the company was concerned after expiration of that period until some arrangement was made satisfactory to the complainant respecting her rights in the surplus aforesaid; and, by the execution of the rider that arrangement was effected by extending the obligations of the company for an additional ten-year term. The rider did not renew a dead contract; it only extended the time for the performance of a living one.

It is true, as insisted by the company, that the rule is well established that a lack of insurable interest by the beneficiary in the life of the insured, where the insurance is taken out and paid for by the beneficiary as a speculation, vitiates the contract. In such case the contract creates the sole interest of the beneficiary in the life insured. He has nothing at stake except the premiums he pays under the policy. All such contracts are wagering pure and simple. *Bendet* v. *Ellis*, 120 Tenn., 277, 111 S. W., 795, 18 L. R. A. (N. S.), 114, 127 Am. St. Rep., 1000; *Conn. Mutual Life Ins. Co.* v. *Schaefer*, 94 U. S., 457, 24 L. Ed., 251; Cooley's Briefs, supra, vol. 1, pp. 246, 247-249, and cases cited.

Section 2 of our Act of 1895, chapter 160, as amended by Act of 1899, chapter 31, defines a contract of insurance to be an "agreement by which one party, for a consideration, promises to pay money or its equiv-

alent, or to do some act of value to the assured, upon the destruction or injury, loss or damage of something in which the other party had an insurable interest." See, also section 3159, Shan. Code.

But the insurable interest of the complainant in the life of Gus Marquet is not to be tested as of the date of the rider, but as of the date of original contract, because that contract was never discharged, but was extended in the time for its performance while executory, and, tested as of the former time, her interest in his life was that of a wife, and clearly insurable, as we have seen. The divorce did not invalidate the pre-existing valid contract of insurance. *Conn. Mutual Life Ins. Co.* v. *Schaefer,* supra; *Snyder* v. *Mystic Circle,* 122 Tenn., 248, 122 S. W., 981.

The first assignment of error based on the first defense above stated, is therefore overruled.

The second assignment of error, based on the second defense above, is that the court was in error in decreeing complainant a recovery of the amount of the policy sued on, because the evidence in this case does not justify the presumption in law that Gus Marquet was dead when this suit began.

"Positive proof is always required where, from the nature of the case, it appears it might possibly have been had. But next to positive proof, circumstantial evidence, or the doctrine of presumption, must take place, for where the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances

which either necessarily or usually attend such facts, and these are called presumptions, which are only to be relied on until the contrary be actually proved. '*Stabitur praesumptio donec probetur in contrarium.*' Violent presumption is many times equal to full proof, for there those circumstances appear which necessarily attend the fact.'' Blackstone, vol. 2, book 3, sec. 371.

Presumption is no magic or shortcut way by which proof of the essential and determinative fact may be dispensed with, for we see from the above quotation that ''positive proof is always required where, from the nature of the case, it appears that it might possibly have been had.'' And, evidently, by the next sentence in the quotation, it is meant to be said that a presumption is only a name for a conclusion reached by means of the weight of proven circumstances; and, before a presumption can exist, the circumstances which attend must be in evidence. Proof of the essential fact must be had, either direct or positive by witnesses who know the fact, or circumstantial by witnesses who know and testify to facts which tend to establish or prove the essential fact; and only when the circumstances are, in the judgment of the court or jury, such as usually or necessarily attend the essential fact are they sufficient in law to warrant a verdict, judgment, or decree establishing as a fact that which has not been proved by direct or positive evidence. This principle was applied by us in *Dunlap* v. *State*, 126 Tenn., 415, 150 S. W., 86.

The essential fact in the present case is the death of Gus Marquet. Upon satisfactory proof of his death, the contract sued on binds the insurance company to pay. There is no direct or positive proof of his death, no witness who testifies that he saw him die, or that he saw his body after death. It is then clearly a case where proof of the essential fact must be made by circumstantial evidence.

The main insistence for the complainant is that, under the proof offered by her in this record, a presumption that Gus Marquet is dead arises.

"The general rule undoubtedly is that 'a person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard from without assuming his death.'" *Davie* v. *Briggs*, 97 U. S., 628, 24 L. Ed., 1088, and authorities there cited.

"It is necessary that the person as to whose death it is sought to raise a presumption shall have been absent from his home or the place where he has established a residence. Thus, where a person has changed his residence from one State or country to another, the fact that he has not been heard of in the place of his former residence for seven years raises no presumption of his death, at least in the absence of evidence that inquiries have been made for him at his last known place of residence without success; and the mere absence of a person from the place where his

relatives reside, but which is not his place of residence, and the fact that his relatives have not received letters from him for seven years, does not raise any presumption of his death.'' Cyc., vol. 13, 300.

''The inference of death to be derived from unexplained absence is, at most, only a presumption, and it cannot arise unless the absence remains unexplained after diligent inquiry is made of the persons and at the places where tidings of the absentee, if living, would most probably be had.'' *Renard* v. *Bennett*, 76 Kan., 854, 93 Pac., 263, 14 Ann. Cas., 240, and authorities cited.

''According to the weight of modern authority, diligent inquiry among friends and relatives, and any others who would probably hear of an absentee, is necessary to raise a presumption of the latter's death, after an unexplained absence of seven years from home or place of residence.'' *Modern Woodmen of America* v. *Gerdom*, 72 Kan., 391, 82 Pac., 1100, 2 L. R. A. (N. S.), 809-812; *Miller* v. *Sovereign Camp Woodmen of the World*, 140 Wis., 505, 122 N. W., 1126, 28 L. R. A. (N. S.), 178, 133 Am. St. Rep., 1095.

''Mere absence is not sufficient to raise the presumption. . . . Evidence of absence from his original place of residence will not raise the presumption of death, where it appears that he has moved to another place.'' *Hansen* v. *Owens*, 132 Ga., 652, 64 S. E., 800; *Wentworth* v. *Wentworth*, 71 Me., 74.

''But the presumption of death at the expiration of seven years from being last heard of does not arise

where it is improbable that the absentee, even if alive, would or could have been heard of at, or would or could have communicated with, his residence, home. or domicile.'' Lawson's Law of Presumptive Evidence, p. 251; *Hitz* v. *Ahlgren*, 170 Ill., 63, 48 N. E., 1068, and authorities cited.

''The rule as to the presumption of the death of a person after seven years' absence was not correctly stated in the charge of the court. This presumption of law, independent of the verdict of the jury upon the facts, does not attach, unless it appears that the person has been absent from his domicile, or last place of residence, without intelligence concerning him for the period of seven years, though a jury may find the fact of death, if the circumstances of the case concur, from the lapse of a shorter period than the seven years.'' *Puckett* v. *State*, 1 Sneed (33 Tenn.), 356.

''Obviously, the courts should be cautious in acting upon the presumption alone, and, as a general rule, diligent inquiry at the place where the party was last heard from should be required.'' *Shoun* v. *McMackin*, 9 Lea (77 Tenn.), 601, 42 Am. Rep., 680.

According to the averment in complainant's bill, and her proof, it is clear that Chattanooga ceased to be the residence place of Gus Marquet on or about the years 1898 or 1899, at which time Oakdale, Tenn., became his residence place, which he left about the year 1900, with the statement that he intended to take a trip to New Orleans. A letter supposed to be from him was received in 1904 by one of his nephews re-

siding in Chattanooga. What domicile or place of residence he established after he left Oakdale does not appear, but clearly the latter place was his last known place of residence. This record fails to disclose any inquiry whatsoever made by her at Oakdale, Tenn., relative to the whereabouts of Gus Marquet. The mere fact that he has not been heard from in Chattanooga, either by any member of his immediate family or others within the past seven years, is of little weight when considered in connection with the complete estrangement between himself and the complainant and his children, resulting from the divorce proceedings. He was enjoined by solemn decree of the court from attempting to have any relations with complainant or with his minor children. All of the children of this unfortunate marriage are shown to have sympathized with the mother in the divorce proceedings, and the father during the seven years of unexplained absence was an outcast from his family.

The complainant calls as witnesses none of the collateral relatives of Gus Marquet who resided in Chattanooga. Her sole evidence to establish the presumption of death in this case is made by herself and her son, W. L. Marquet, who, as shown by the divorce bill, had refused to reside under the same roof with his father before the bill was filed.

Without going into the evidence touching inquiries made by the complainant in further detail, it suffices to say that, in our opinion, the evidence here does not warrant a finding that Gus Marquet was dead when

this bill was filed. Complainant testified that he was, up to the time she last saw him, always in good health, and that she had never known him to be sick as much as one day. His application for the original policy shows that he was born in France on the 8th day of October, 1855.

Wherefore the decree appealed from must be reversed. We think that we can see from this record that justice will in all probability be done by remanding this cause, with leave to each side to take further proof, and it is so ordered. *Bank* v. *White*, 114 Tenn., 73, 84 S. W., 697.

JENNINGS, NEFF & Co. *v.* CRYSTAL ICE Co. *et al.**

(*Knoxville.* September Term, 1913.)

1. **CORPORATIONS. Transfer of assets. Rights of creditors.** Corporate assets are a trust fund, at least to the extent that creditors are entitled in equity to payment of their debts before any distribution among stockholders, and creditors have a right to follow such assets into the hands of anyone not a holder in good faith in the ordinary course of business. (*Post*, *p.* 236.)

Case cited and approved: Vance v. MeNabb Coal & Coke Co. et al., 92 Tenn., 47.

2. **CORPORATIONS. Transfer of assets. Rights of creditors.** Where a corporation, in consideration of its own stock and bonds, purchases all the assets of another corporation without provision for the seller's debts, the transaction is out of the ordinary course of business, and the circumstances of the case imply full knowledge on the part of the purchaser of all facts necessary to charge the property in its hands with the debts of the seller. (*Post*, *p.* 236.)

Cases cited and approved: Altoona v. Richardson Gas & Oil Co., 81 Kan., 717; Grenell v. Detroit Gas Co., 112 Mich., 70.

3. **CORPORATIONS. Transfer of assets. Rights of creditors.** Where a corporation pending a suit against it transferred all of its property to another corporation, which agreed to assume payment of certain debts not including the one in suit, "and none other," and the purchaser in exchange therefor issued its own stock and bonds which, without provision for the creditors of the seller, it permitted to be distributed among

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*For a discussion of the authorities on the effect of consolidation, merger, or absorption of corporation, on its unsecured liabilities in absence of statutory or contract provision relative thereto, see notes in 11 L. R. A. (N. S.), 1119 and 32 L. R. A. (N. S.), 616.

the seller's stockholders, most of whom were nonresidents, the purchaser was a party, with full notice, to the diversion of the trust fund, and as such held the property acquired by it impressed with the same trust with which it was originally charged, and was liable to the seller's creditors to the extent of the value of the property thus obtained; the creditors not being required to look alone to such stock and bonds. (*Post*, *pp.* 237, 238, 239.)

Cases cited and approved: Altoona v. Richardson Gas & Oil Co., 81 Kan., 717; Grenell v. Detroit Gas Co., 112 Mich., 70; Hurd v. New York & C. Steam Laundry Co., 167 N. Y., 89; McIver v. Young Hardware Co., 144 N. C., 478; Ft. Payne Bank v. Ala. Sanitarium, 103 Ala., 358; Chattanooga R. & C. R. Co. v. Evans, 66 Fed., 809; Hibernia Ins. Co. v. St. Louis & N. O. T. Co. (C. C.), 13 Fed., 516; Vicksburg & Yazoo City Telephone Co. v. Citizens' Telephone Co., 79 Miss., 341; Vance v. McNabb Coal & Coke Co., 92 Tenn., 47; Long v. Fisher Typewriter Co., 1 Tenn. Ch. App., 668; Northern Pacific Ry. Co. et al. v. Boyd, 228 U. S., 482.

Case cited and distinguished: Bristol Bank & Trust Co. v. Jonesboro Banking & Trust Co., 101 Tenn., 545.

4. CORPORATIONS. Transfer of assets. Remedies of creditors. A fund due to a corporation, which sold all of its property to another corporation, which fund had been assigned to the purchaser, was not subject to levy or attachment in an action at law against the seller, and hence a bill in equity against the seller and purchaser could be maintained by a judgment creditor of the seller to read such fund. (*Post*, *p.* 241.)

Case cited and approved: Bryan v. Farecar, 112 Tenn., 503.

FROM HAMILTON.

Appeal from Chancery Court, Hamilton County.—T. M. McConnell, Judge.

SIZER, CHAMBLISS & CHAMBLISS, for appellants.

W. B. MILLER, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

The Crystal Ice Company, prior to 1910, operated two ice plants in the city of Chattanooga. Its properties were valued at about $300,000. It is not clear from the record just how many bonds it had outstanding; the amount was certainly not more than $90,000, however. Its current indebtedness seems to have been about $13,000. The net value of its assets, therefore, was in the neighborhood of $200,000. It was a Georgia corporation.

By two conveyances dated February 1, 1910, and November 11, 1910, respectively, the Crystal Ice Company transferred all its property of every description to the Atlantic Ice & Coal Corporation, which latter concern was chartered under the laws of Virginia. By the first conveyance above referred to, the plants operated by the Crystal Company were transferred to the Atlantic Company, and the former company ceased its business of manufacturing ice. It appears to have retained, however, its office for the purpose of collecting accounts and other similar matters, and by the second conveyance above referred to, on November 11, 1910, all its *choses* in action, bills receivable, a contingent interest in some litigated property, and all remaining assets were transferred to the Atlantic Com-

pany. After the second conveyance, while the Crystal Ice Company remained a corporate entity, it was a mere shell, having no property of any description.

Prior to February 1, 1910, the date of the first conveyance above mentioned, the complainants herein had brought suit against the Crystal Company in the courts of Hamilton county, and this suit was pending when the Crystal Ice Company was absorbed by the Atlantic Company in the manner just stated. A judgment was recovered against the Crystal Company by the complainants on April 21, 1911, and this judgment was affirmed by this court at the September term following, the amount thereof being $2,786.81 and costs. Execution was issued upon this judgment and was returned *nulla bona;* the Crystal Company being without assets at this time.

Aside from some $13,000 of its debts which were assumed by the Atlantic Company, the only consideration received by the Crystal Company for its assets was stock and bonds of the Atlantic Company. These securities of the absorbing company were turned over to the Crystal Company at the ratio of $1.75 for every $1 of its own stock. The transfer seems to have been effected through a Georgia trust company, and the securities of the Atlantic Company were distributed to the stockholders of the Crystal Company from Atlanta. Practically all of the stockholders of the Crystal Company resided in Georgia.

The complainants filed this bill in the chancery court of Hamilton county, seeking to reach certain real es-

tate in Chattanooga transferred in this deal by the Crystal Company to the Atlantic Company, and also to reach a certain fund in the hands of the Nashville, Chattanooga & St. Louis Railway, assigned by the Crystal Ice Company to the Atlantic Ice & Coal Company, and to subject this land and this fund to the satisfaction of their judgment against the Crystal Ice Company. It amounted to something over $6,000, and was withdrawn by the Atlantic Company, a bond being substituted therefor.

The chancellor sustained complainants' suit and gave them a decree on the above-mentioned bond for the amount of their judgment and interest, and the Atlantic Company has appealed to this court.

From the foregoing, it is seen that we have presented to us a case in which one corporation has acquired practically the entire assets of another in exchange for the stock and bonds of the purchasing company. The selling company retains no property and goes out of business. This is not, strictly speaking, a legal merger because the selling company retains its legal entity, although it is entirely dismantled of its assets. Such a transaction is sometimes referred to as a *de facto* merger. Whether the merger be *de facto* or *de jure*, the plight of the creditors of the absorbed corporation is the same. No property is left out of which they may satisfy their claims in either case in the hands of the selling corporation.

We think the chancellor's decree was correct.

It is insisted for appellant that where a corporation transfers all its assets to another corporation for a fair and adequate consideration, and both corporations maintain a separate existence, in the absence of fraud, the purchasing corporation will not be liable for the debts of the other.

The doctrine that corporate assets are a trust fund, at least to the extent that creditors are entitled in equity to payment of their debts before any distribution of corporate property is made among stockholders, is fully established in Tennessee, and creditors have a right to follow its assets or property into the hands of anyone who is not a holder in good faith in the ordinary course of business. *Vance* v. *McNabb Coal & Coke Company et al.*, 92 Tenn., 47, 20 S. W., 424; Pomeroy's Equity Jurisprudence, sec. 1046.

There is abundant authority likewise for the proposition that where one corporation, for its own stock and bonds, purchases all the assets of another, without provision for the debts of the latter, the transaction is out of the ordinary course of business, and the very circumstances of the case imply full knowledge on the part of the purchasing corporation of all facts necessary to charge the property in its hands with the debts of the selling corporation. Thompson on Corporations, sec. 6547; 10 Cyc., 1267; *Altoona* v. *Richardson Gas & Oil Co.*, 81 Kan., 717, 106 Pac., 1025, 26 L. R. A. (N. S.), 651; *Grenell* v. *Detroit Gas Co.*, 112 Mich., 70, 70 N. W., 413.

We may further observe that suit was pending on this particular demand at the time of the absorption of the properties of the Crystal Company by the Atlantic Company. Moreover, in the contract whereby certain of the Crystal's property was transferred, a number of its debts were scheduled, and it was agreed that the Atlantic Company should assume payment of the debts named, "and none other." The implication is unavoidable that the Atlantic Company knew of the existence of claims against the Crystal other than those it assumed, and undertook to relieve itself of liability for same by contract. We must conclude that it had both actual and constructive notice of such unpaid debts.

It follows that when this purchasing corporation took over in exchange for its own stock and bonds the assets of the other, and permitted these securities which it had substituted for the visible, tangible property of the selling corporation to be distributed among the shareholders of the latter, without provision for the creditors of the latter, it thereby became a party, with full notice, to the diversion of a trust fund. As such, the purchasing corporation holds the property so acquired impressed with the same trust with which said property was originally charged, and the purchasing corporation is liable to the creditors of the selling corporation to the extent of the value of the property thus obtained.

Creditors of the old corporation cannot be required to look alone to the stock and bonds which were sub-

stituted for the real, tangible assets of that corporation. The value of securities so substituted is more or less problematical, and creditors should not be forced to surrender their claim against available, visible assets, and transfer such claim to new securities. Their remedy cannot thus be hindered and impaired for the benefit of stockholders.

This would be true even if the securities the Atlantic Company had given in exchange for the properties of the Crystal Company had actually been held intact by the latter company until all creditors were satisfied. As a matter of fact, however, in this case these securities were distributed among the stockholders of the Crystal Company from Atlanta, and there is nothing to indicate that such distribution was not had immediately upon the conveyance of the Crystal Company being executed.

Furthermore, these were securities of a foreign corporation, and were distributed among nonresidents of the State, and we are unwilling to approve any device by which tangible property of a corporation located here and subject to the debts of that corporation can be withdrawn from the reach of creditors and distributed among nonresident stockholders. Corporate creditors may not be thus deprived of available security for their claim and forced to resort to difficult and inconvenient litigation in foreign States.

We are aware that there is some conflict in the cases as to the rights of creditors under circumstances such as these, but we think the views we have expressed are

sustained by the weight of authority. We have no hesitation in announcing our belief that such views are correct, and they are in harmony with the following cases: *Altoona* v. *Richardson Gas & Oil Company,* 81 Kan., 717, 106 Pac., 1025, 26 L. R. A. (N. S.), 651; *Grenell* v. *Detroit Gas Company,* 112 Mich., 70, 70 N. W., 413; *Hurd* v. *New York & C. Steam Laundry Co.,* 167 N. Y., 89, 60 N. E., 327; *McIver* v. *Young Hdw. Co.,* 144 N. C., 478, 57 S. E., 169, 119 Am. St. Rep., 970; *Ft. Payne Bank* v. *Ala. Sanitarium,* 103 Ala., 358, 15 South., 618; *Chattanooga R. & C. R. Co.* v. *Evans,* 66 Fed., 809, 14 C. C. A., 116; *Hibernia Ins. Co.* v. *St. Louis & N. O. T. Co.* (C. C.), 13 Fed., 516; *Vicksburg & Yazoo City Telephone Company* v. *Citizens' Telephone Co.,* 79 Miss., 341, 30 South., 725, 89 Am. St. Rep., 656.

Our own cases, while not exactly in point, on principle, support our holding. *Vance* v. *McNabb Coal & Coke Company,* 92 Tenn., 47, 20 S. W., 424; *Long* v. *Fisher Typewriter Co.,* 1 Tenn. Ch. App., 668.

The case of *Bristol Bank & Trust Company* v. *Jonesboro Banking & Trust Co.,* 101 Tenn., 545, 48 S. W., 228, is not applicable, for that treated of the conveyance of the assets of a partnership and not those of a corporation.

Referring again to the authorities above cited, it is said by the New York Court of Appeals in *Hurd* v. *New York & C. Steam Laundry Co.,* 167 N. Y., 89, 60 N. E., 327, that when a creditor of a corporation so absorbed demands payment of his claim, "he is referred to the empty shell which is all that is left of the live cor-

poration whose tangible assets constituted a trust fund for the payment of its debt at the time of its creation. When he seeks to follow this fund, he is told that the capital stock of the defendant in the hands of those who may be *bona fide* holders is his only resort. This is not the law."

In *Grenell* v. *Detroit Gas Co.*, 112 Mich., 70, 70 N. W., 413, it is said:

"A corporation cannot sell all of its property, and take in payment stock in a new corporation, under an arrangement that has the effect of distributing the assets of the vendor among its stockholders, to the exclusion and prejudice of its creditors; and a company making such a purchase, in consideration of an issue of its own stock to such stockholders, takes the property subject to the rights of creditors. Such an arrangement is a diversion of the trust fund. . . . It was bound to know that this property was charged with such debts, and ought not to be distributed among the stockholders to the exclusion of creditors. It was a party, then, to a diversion of the trust fund, and, having in its possession such fund, holds it subject to the payment of debts. It cannot be called a *bona fide* purchaser of the property, as against existing creditors."

The Kansas court, in the case of *Altoona* v. *Richardson Gas & Oil Co.*, 81 Kan., 717, 106 Pac., 1025, 26 L. R. A. (N. S.), 651, says:

"Where a corporation becomes practically extinct, transferring all its assets to another and receiving in

return stock in the other corporation, which succeeds to its business, the new corporation is liable, to the extent of the value of the property acquired, for the debts of the old one. Such an arrangement is essentially a merger, and should be attended with the same consequences as a consolidation."

The North Carolina court in *McIver* v. *Young Hdw. Co.*, 144 N. C., 478, 57 S. E., 169, 119 Am. St. Rep., 970, observes:

"Such a conveyance of the assets is practically, and to all intents and purposes, a voluntary one, as no consideration is actually paid to the corporation which can stand as a substitute to creditors for the assets so transferred and be as available and valuable to them as the original trust fund, the place of which it has taken. A transaction that produces this result will not defeat the trust which the law imposes upon the fund, nor impair the remedy of creditors if any debts remain unpaid."

Responding to the contention that creditors should be required to resort alone to the stock of the purchasing company received for the assets of the selling company, in *Hibernia Ins. Co.* v. *St. Louis & N. O. T. Co.* (C. C.), 13 Feb., 516, the court says:

"Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed upon the market."

Without further elaboration or quotation from the cases, we are satisfied that our conclusion heretofore announced is sound, and we are content to rest it upon the authorities mentioned. Cases bearing on all phases of this question are collected in notes in 11 L. R. A. (N. S.), 1119, and 32 L. R. A. (N. S.), 616.

In the recent case of *Northern Pacific Ry. Co. et al.* v. *Boyd* (April 28, 1913), 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. ——, the supreme court goes to far greater length than do we herein to protect the rights of a corporate creditor.

It is insisted that the chancellor was in error in subjecting the fund in the hands of the Nashville, Chattanooga & St. Louis Railway to the payment of this judgment. The contention is that this fund was a debt due to the Crystal Company, and that this bill is merely a proceeding to subject this debt due the Crystal Company to a judgment against that company, and it is argued that equity has no jurisdiction of such proceedings, inasmuch as the fund in the hands of the railway company was subject to levy or attachment at law. *Bryan* v. *Zarecor*, 112 Tenn., 503, 81 S. W., 1252, is cited for this.

Appellants misapprehend the scope of the bill. It is distinctly stated therein in the alternative that this claim against the railway is due to the Atlantic Company, and is the property of the Atlantic Company, and in one aspect the bill seeks to reach it as the property of the Atlantic Company. Considered in this light, the bill was properly maintained. This demand,

subject to the result of the litigation between the railway company and the Crystal Company, was duly assigned to the Atlantic Company, as the proof shows, and the complainants had a right to follow all property of the Crystal Company into the hands of the Atlantic Company to the extent that such property was exchanged for stock and bonds. Considering this fund as the property of the Atlantic Company, it could have been reached in no other way than by bill in equity.

There is no error in the decree of the chancellor, and it will be affirmed, with costs.

ANDERSON *v.* LOUISVILLE & N. R. Co.*

(*Knoxville.* September Term, 1913.)

1. **EXECUTORS AND ADMINISTRATORS. Appointment of administrator. Jurisdiction of courts. Existence of assets.**

Under Shannon's Code, sec. 3935, providing that letters of administration may be granted upon the estate of a nonresident, by the county court of any county in this State where the deceased had any goods, chattels, or assets at the time of his death, where at the time a nonresident was killed in a county in this State he had on his person personal property of the value of $35, such property would support administration in such county; its value, or the fact that it was on his person rather than elsewhere, being immaterial. (*Post*. *p.* 247.)

Code cited and construed: Sec. 3935 (S.).

Cases cited and approved: Harrington v. Brown, 22 Mass., 519; Pinney v. McGregory, 102 Mass., 186; Railroad v. Bradley, 51 Neb., 596.

2. **EXECUTORS AND ADMINISTRATORS. Assets. Property subject.**

A pistol, a gold watch, a gold badge of an order, and money belonging to a decedent were all subject to administration, none of such property being exempt. (*Post*, *p.* 248.)

3. **EXECUTORS AND ADMINISTRATORS. Assets. Property subject.**

Where a nonresident at the time of his death left property in K. county, administration might be had in that county, although subsequent to his death some one without authority sent such property to his wife in another state, since the

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*On the question what assets will give jurisdiction to appoint administrator, generally, see note in 24 L. R. A., 684.

parties responsible could be made to answer for such removal. (*Post*, *p.* 248.)

Cases cited and approved: Missouri Pacific R. R. v. Bradley, 51 Neb., 596; Bullock v. Rogers, 16 Vt., 295; Valentine v. Jackson, 9 Wend. (N. Y.), 302.

4. EXECUTORS AND ADMINISTRATORS. Title of administrator.

The property of a decedent vests in his administrator, when appointed, by relation from the date of the death. (*Post*, *p.* 248.)

FROM KNOX.

Error to Circuit Court, Knox County.—VON. A. HUFFAKER, Special Judge.

SHIELDS, CATES & MOUNTCASTLE and J. HARRY PRICE, for plaintiff in error.

JAS. B. WRIGHT and JAS. G. JOHNSON, for defendant in error.

MR. JUSTICE GREEN delivered the opinion of the Court.

This was a proceeding brought by the Louisville & Nashville Railroad Company to revoke letters of administration granted to W. K. Anderson upon the estate of Ray Farmer, who was killed in Knox county, Tenn., on the 1st of January, 1909.

The proceeding was based on the case of *Railroad* v. *Herb*, 125 Tenn., 408, 143 S. W., 1138; it being sup-

posed that this case furnished a precedent for the propriety of the action here instituted by the railroad company. The contention of the railroad company was sustained by the county court, and the letters of administration to Anderson were revoked, and this action of the county court was affirmed by the circuit court. The court of civil appeals, however, reversed the lower courts and dismissed the proceeding. The railroad company has brought the matter before us on petition for *certiorari*.

The deceased, Farmer, was a brakeman in the employ of the railroad company, running at the time of his death from Etowah, in Tennessee, to Corbin, in Kentucky. He was a resident of the State of Kentucky, and the Louisville & Nashville Railroad Company is likewise a Kentucky corporation. Farmer was killed in the yards of the railroad company in Knoxville, and after Anderson qualified as administrator he brought suit to recover damages for his death in the United States District Court at Knoxville.

At the time deceased was killed, he had on his person a Smith & Wesson pistol, a gold watch, a gold badge of an order to which he belonged, and $35 in money. This property was sent to his wife in Kentucky.

The court of civil appeals held that letters of administration were properly issued on the estate of Farmer in Knox county, inasmuch as he had property in that county at the time of his death.

The provisions of our Code (Shannon's, sec. 3935) are as follows:

"Nonresidents' Estate, Administration.—Letters testamentary or of administration may be granted upon the estate of a person who resided, at the time of his death, in some other State or territory of the Union, or in a foreign county, by the county court of any county in this State:

"(1) Where the deceased had any goods, chattels, or assets, or any estate, real or personal, at the time of his death, or where the same may be when said letters are applied for.

"(2) Where any debtor of the deceased resides.

"(3) Where any debtor of a debtor of the deceased resides, his debt being unpaid when the application is made.

"(4) Where any suit is to be brought, prosecuted, or defended, in which said estate is interested."

The conclusion of the court of civil appeals is obviously correct. As heretofore enumerated, the deceased had certain goods, chattels, or assets in the county of Knox when he died, and under the provisions of subsection 1 it was proper for the county court of Knox county to issue letters of administration upon his estate.

The value of these goods and chattels is immaterial for the purposes of administration. Administration may be granted for an estate of $35, as well as for an estate of $35,000. Nor is it material that the goods and chattels referred to were on the person of deceased at the time of his death. Such property is alike subject to administration, whether it be found on the per-

son of deceased, or whether it be found in his bank. It was located in Knox county at the time of his death, and that is the material circumstance. Pritchard on Wills and Administration, secs. 66-68; *Harrington* v. *Brown*, 22 Mass. (5 Pick.), 519; *Pinney* v. *McGregory*, 102 Mass., 186; *Railroad* v. *Bradley*, 51 Neb., 596, 71 N. W. 283.

None of the property which deceased had in Knox county at the time of his death was exempt, but all of it was subject to administration.

The fact that this property was subsequently sent to his widow in Kentucky by some one does not alter the *status* of the case. It was sent there without authority. The statute makes the right of administration dependent upon the location of the property at the death of deceased, and if it be removed without authority, administration may still be had, and the responsible parties made to answer for such removal. For a case exactly in point, see *Missouri Pacific R. R.* v. *Bradley*, 51 Neb., 596, 71 N. W., 283. The property of a decedent vests in his administrator when appointed by relation from the date of the death. *Bullock* v. *Rogers*, 16 Vt., 295; *Valentine* v. *Jackson*, 9 Wend. (N. Y.), 302; Woerner's Law of Administration, vol. 1, sec. 173.

Railroad v. *Herb, supra*, has no application here. In that case, decedent had no estate at the time of his death in the county where administration was sought. Furthermore, *Railroad* v. *Herb* dealt with the right

of administration, where deceased was wrongfully injured in another State and died in another State.

The judgment of the court of civil appeals is affirmed.

MAYOR AND ALDERMEN OF KNOXVILLE *v.* CAIN.*

(*Knoxville.* September Term, 1913.)

1. **MUNICIPAL CORPORATIONS. Torts. Obstructions in streets. Contributory negligence. Knowledge of defect.**

While a citizen, walking along a street, need not keep his eyes on the pavement all the time, and may assume that the city has done its duty, and may even be excused for temporary forgetfulness of a danger when his attention is distracted, where plaintiff, walking along the street after dark, was injured by falling over some stakes two or three feet high driven in the ground at the edge of the sidewalk, the presence of which he was familiar with, which he testified that he simply forgot, without offering any excuse, he is precluded by his negligence from recovery against the city. (*Post*, *p.* 255.)

Cases cited and approved: Lerner v. City of Philadelphia, 21 L. R. A. (N. S.), 614, 648-653; Reynolds v. Los Angeles & E. Co., 39 L. R. A. (N. S.), 896; Jacobson v. Oakland Meat & Packing Co., Am. Cas., 1913B, 1194, 1197-1204; Carson v. City of Genesee, 9 Idaho, 244; Brownsville v. Arbuckle (Ky.), 99 S. W., 239; Town of Corinth v. Lawrence (Ky.), 127 S. W., 1009; City of Natchez v. Lewis, 90 Miss., 310; Chase v. Atchison, T. & S. F. Ry. Co., 134 Mo. App., 655; Knoxville v. Cox, 103 Tenn., 372.

2. **TRIAL. Taking case from jury. Direction of verdict. Consideration of evidence.**

In passing on a motion by defendant for a peremptory instruction in his favor, it must be assumed that the evidence of plaintiff's witnesses is true. (*Post*, *p.* 252.)

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*The authorities on the question of the effect of contributory negligence on municipal liability for defects and obstructions in street are collated in an extensive note in 21 L. R. A. (N. S.), 615.

Mayor and Aldermen v. Cain.

3. **NEGLIGENCE. Contributory negligence. Question for jury.** Where the evidence shows without contradiction that plaintiff's negligence proximately contributed to his injury, the case is one for a peremptory instruction for the defendant. (*Post*, *p.* 258.)

Cases cited and approved: Railway v. Haynes, 112 Tenn., 712, 730-734; Tyrus v. Railroad, 114 Tenn., 579.

FROM KNOX.

Appeal from Circuit Court, Knox County.—VON A. HUFFAKER, Judge.

W. F. BLACK, for plaintiff.

W. T. KENNERLY, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

This action was brought by Cain against the plaintiff in error to recover damages for an injury alleged to have been inflicted upon him by the negligence of the city in permitting the existence of certain obstructions on the sidewalk of Bluff street. He recovered a judgment for $200, and from this an appeal was prosecuted to the court of civil appeals, and there the judgment was reversed. The case was then brought to this court by the writ of *certiorari*.

There was a motion made in the trial court for a peremptory instruction in favor of the plaintiff in error, defendant in that court. Error is assigned here

upon the action of the court of civil appeals in sustaining that motion and reversing the trial court because of its disallowance of the motion.

The facts disclosed by the record are as follows:

Bluff street is a short and narrow residence street near the boundary line of the city. At the place where the accident occurred there was a cinder way doing service for a sidewalk, about three and one-half feet wide. At the outer edge of this cinder path, where the curbing would have been if the street had been paved with bricks or cement, and nearly opposite the gate of one Clift, there were two sticks or stobs driven in the ground for the purpose of preventing wagons from encroaching upon the cinder way. One of these stobs was two feet and two inches high, and the other about three feet and two inches. They were three to five inches in circumference at the top, and had been placed in the margin of the sidewalk, according to Cain's witnesses, with the consent of John W. Flenniken, chairman of the board of public works, who, as such chairman, had charge of the streets and street forces of the city. This is denied by Mr. Flenniken; but, in passing on this motion, we must assume the evidence of the plaintiff's witnesses as true.

The injury occurred at night, just after dark, in July, 1910. The stobs had been placed two or three weeks before this time. Cain testifies that he passed along the sidewalk in question every day, and was familiar with the location of the objects mentioned. It is shown that on the night of the injury he had been

to a grocery store on business and was returning home, walking rapidly, in company with one Jim Taylor. While so walking he stumbled against one of the stobs and could not recover himself, and fell against the other as the result of his first misadventure, and as a consequence he suffered a severe injury in one of his legs, and fractured one of his ribs. There were lights about 190 feet each way from the location of the stobs, one of which was an arc light, and the other a small incandescent light; but the trees were in full leaf, and cast a shadow upon the place where the stobs were located, and, owing to the distance of the lights, and the partial obscuration of the arc light by an intervening hill or roll in the street, and also owing to the shadow made by the foliage of the trees, Cain probably could not have clearly seen the stobs at the time he ran on them, even if he had been looking. We now quote from his testimony: "Q. If you knew the sticks were there, how happened you to run into them? A. Just forgot. Q. Just temporarily forgot them? A. Yes, sir; I just forgot; hadn't been any time since I just thought of the sticks; it hadn't been but about a minute. Q. Could you see the sticks any time before you got to them? A. No, sir; I could not, I couldn't see anything there."

Do these facts present a case for peremptory instructions in favor of the city, because of the contributory negligence of Cain?

The cases bearing on the subject of momentary forgetfulness of a danger are very numerous. As appli-

cable to defects in streets, many will be found collected and digested in a note to *Lerner* v. *City of Philadelphia,* 21 L. R. A. (N. S.), 614, 648-653, and *Reynolds* v. *Los Angeles & E. Co.,* 39 L. R. A., (N. S.), 896, and as applicable to master and servant in a note to *Jacobson* v. *Oakland Meat & Packing Co.,* Ann. Cas., 1913B, 1194, 1197-1204. See, also, *Carson* v. *City of Genesee,* 9 Idaho, 244, 74 Pac., 862, 108 Am. St. Rep., 127; *Brownsville* v. *Arbuckle* (Ky.), 99 S. W., 239; *Town of Corinth* v. *Lawrence* (Ky.), 127 S. W., 1009; *City of Natchez* v. *Lewis,* 90 Miss., 310, 43 South. 471; *Chase* v. *Atchison, T. & S. F. Ry. Co.,* 134 Mo. App., 655, 114 S. W., 1141. See, also, 3 Abb. Munic. Corp., sec. 1049, and note.

It is impossible to formulate a rule which will embrace all of these cases. We have one case on the subject, *Knoxville* v. *Cox,* 103 Tenn., 372, 53 S. W., 736, in which the court quoted from Beach on Contributory Negligence, as cited by counsel, the following:

"Where one, knowing the danger, temporarily forgets it and in consequence suffers, his forgetfulness will not avail him as an excuse. What he knows he must remember at his peril, and not to remember is contributory negligence, if it occasions the injury," and then commented: "If this is to be understood as announcing the proposition that prior knowledge of a defect, with momentary forgetfulness of its existence, resulting in an injury, constitute contributory negligence which will bar recovery, then we are not prepared to accept it. These facts while they are to be

considered by the jury in determining whether the plaintiff's negligence has proximately contributed to his injury, yet of themselves do not necessarily constitute such negligence."

It is to be remembered, in considering the facts now before the court, that three and one-half feet width of way permitted no extra space for two men to walk together, and that Cain, who was on the outside, was necessarily thrown very near the stobs in passing them. It was too dark to see the stobs, and the two men were walking rapidly. Under the circumstances there was evident danger of tripping on the stobs. There can be no doubt that, if Cain had kept the place, the situation, and the stobs in mind, he would not have been injured; as little doubt that his failure to keep these things in mind was the proximate cause of that injury. He knew the danger, but did not keep it in mind. Was his forgetfulness an excuse? We agree that a citizen walking along a street does not have to keep his eyes on the pavement all the time; that he may presume the city has done its duty; that even when he knows it has not done its duty, and there is a defect of which he has knowledge, he does not have to keep the defect in mind at all times on peril of suffering injury without redress; that if his attention is called away by any cause adequate to effect that result, considering human nature in its ordinary aspects, and with regard to its ordinary susceptibilities, he may be excused, and that a jury must judge of the adequacy and reasonableness of such cause as related to the duty of ordinary care

on the part of the citizen. We can, understand how terror, caused by the near approach of a runaway horse, or of a rabid dog, or the approach of any dangerous animal, or the threatening aspect of a dangerous, violent man, or a sudden fire alarm, or the happening of an accident to any person in view of one, or the suddenly communicated news of the illness of a relative or friend, or the absorption of the mind in the condition of a sick relative or friend just visited, or about to be visited, or even the hail of an acquaintance across the street, may divert the attention from a known danger, without impeachment of negligence on the part of the person so diverted (having respect however, always to the gravity of the danger, which, when great, should command the greater attention); but we do not see how one can be excused who admits that there was nothing to divert his attention, that he simply forgot—that is, that he failed to pay attention to his going. Therefore, while it is true, as laid down in *Knoxville* v. *Cox,* that the mere fact of a temporary lapse of memory in presence of a known danger is not always proof of negligence, yet we think this must be understood with the qualification above indicated; that is, that such lapse must be shown to have reasonable cause, one which is apart from mere inattention. The duty of everyone in presence of a known danger is to give heed, and to walk with care; yet the law recognizes the truth that men are imperfect, that few have adequate command of their faculties, emotions, and propensities, and the power of steady atten-

tion, and that most are easily moved from the due balance of mental composure. So it is the exceptions we have mentioned, and others like them, are tolerated out of tenderness to the weakness of human nature. But we do not think we should go the length of holding that every lapse of memory is excusable. Such a rule would breed fraud, and put an end to the responsibility of plaintiffs for the exercise of due care, or at least render impossible the enforcement of it when interest prompts deception and weakness yields to it.

We are of the opinion, therefore, that defendant in error was, on his own showing, inexcusably negligent, and that the trial judge should have given the peremptory instruction called for.

But it is urged that the question of contributory negligence is one always for the jury. This subject was considered in *Railway* v. *Haynes*, 112 Tenn., 712, 730-734, 81 S. W., 374. It was there held that the negligence of a plaintiff is as much a matter for the examination of the court as that of a defendant, with a view to determining whether there was negligence in law, but that whether such negligence, conceding its existence, was the proximate cause of the injury, or proximately contributed to it, was always a question for the jury. "The question of contributory negligence, in the aspect above indicated," continued the court, "is always a matter for the jury. Subsequently, however, on appeal, in considering the verdict of the jury under an assignment that there is no evidence to sustain the verdict, or upon reviewing the action of

the court below upon a demurrer to the evidence, this court will determine whether the facts proven clearly show contributory negligence upon the part of the plaintiff below that acted as a proximate cause to produce the injury, and, upon ascertaining the existence of such proximate contributory negligence, will reverse the judgment." We may add that, where the evidence shows, without contradiction, as in the case now before us, that the plaintiff below was not only negligent, but that his negligence proximately contributed to the injury which he received, the case is one for peremptory instructions. There is nothing for the jury to determine. *Tyrus* v. *Railroad,* 114 Tenn., 579, 86 S. W., 1074.

It results there is no error in the judgment of the court of civil appeals, and it must be affirmed.

FERGUSON *v.* BOOTH.

FERGUSON *v.* FERGUSON.

(*Knoxville.* September Term, 1913.)

1. **EVIDENCE. Documentary evidence. Recitals in deeds. Effect.**

Particular recitals in a deed are conclusive evidence of the facts recited, in actions in which the purpose of the deed is directly involved. (*Post*, *p.* 265.)

Cases cited and approved: George v. Bischoff, 68 Ill., 236; Usina v. Wilder, 58 Ga., 178; Mix v. People, 86 Ill., 329.

2. **EVIDENCE, Documentary evidence. Recitals in deeds. Effect. Collateral issue.**

In ejectment between the heirs of a wife who conveyed property to her husband and the husband's grantees, the deed from the wife is collateral to the purpose of the action, and the recitals therein are only prima facie evidence of the facts recited, but they are evidence and receivable as such against all those claiming under the deed. (*Post*, *pp.* 265, 266.)

3. **EVIDENCE. Documentary evidence. Recitals in deeds. Weight as evidence.**

Where the recitals in a deed which is collateral to the purpose of the action are particular and definite and are corroborated by the substantial evidence of the parties and are not contradicted by anything in the record, they may be accepted as true. (*Post*, *p.* 265.)

4. **TRUSTS. Resulting trust. Relationship between parties.**

The general rule that, where one buys land in the name of another and pays the consideration therefor, the land will be held in trust for the person paying the consideration does not apply where a parent purchases land in the name of his child or a

husband in the name of his wife, in which case an advancement or gift will be presumed from the relationship. (*Post*, *p.* 269.)

Cases cited and approved: Whitten v. Whitten, 3 Cush. (Mass.), 191; Kimbrough v. Kimbrough, 99 Ga., 134; Barnum v. Le Master, 110 Tenn., 640.

5. **HUSBAND AND WIFE. Wife's separate estate. Conveyance to wife. Husband's request.**

The rule that, where a stranger makes a conveyance to a wife, there must be apt words used to create a separate estate in the wife does not apply where the husband pays the consideration for the property and directs the conveyance to be made to the wife, in which case the rule is the same as if the conveyance were directly from the husband and the wife takes a separate estate which she may convey to her husband under Shannon's Code, sec. 4246. (*Post*, *p.* —.)

Code cited and construed: Sec. 4246 (S.).

Cases cited and approved: Barnum v. Le Master, 110 Tenn., 640; Vick v. Gower, 92 Tenn., 391.

FROM KNOX.

Appeal from Chancery Court, Knox County.—WILL D. WRIGHT, Chancellor.

NOBLE SMITHSON, for W. P. Ferguson.

GEO. FOX, for Eliza Ferguson.

LEWIS TILLMAN, for Wm. H. Booth.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

These two cases are actions of ejectment brought to recover lots 306 and 316 in Shields' addition of Lonsdale. Complainant and defendants deraign title back to John H. Shields as the common source. The complainant's title is as follows:

Rufus and Margaret Elizabeth Ferguson were married January 15, 1854. The complainant, W. P. Ferguson, and a daughter were born of that marriage prior to January 6, 1862. John H. Shields, A. G. Jackson, and J. C. Mitchell conveyed the land in controversy to Margaret E. Ferguson, wife of Rufus, on January 6, 1862, by deed containing covenants of general warranty, and in the usual form of deeds, without any words indicating a separate or other special estate in Elizabeth.

The complainants are the heirs at law of W. P. Ferguson. Defendants deraign their title thus: On August 20, 1862, Elizabeth executed a deed to her husband conveying the lands to him and acknowledging it before the clerk of the county court with proper privy examination. In 1864 Rufus Ferguson divorced Elizabeth, and the decree of divorce makes no reference to the interest of either Elizabeth or Rufus in the lands in controversy and does not attempt to affect the rights of the parties thereto. Rufus Ferguson remarried November 25, 1866. In September, 1888, Rufus and his then wife, Eliza, conveyed the northern

half of the lots in controversy to Ida Ross, and the defendant Booth claims under this conveyance by a chain of title to which no exception is taken as to its sufficiency.

Elizabeth Ferguson died ten or fifteen years before the suit was brought and Rufus died in 1910. It is made to appear by instruments of writing filed in the record that John H. Shields entered into a written agreement with J. C. Mitchell February 25, 1859, by which Shields sold to Mitchell the two lots in controversy for the consideration of $600 to be paid by Mitchell and his son in labor to be rendered Shields at the rate of $1 per day each. Prior to this agreement with Mitchell, and on August 13, 1858, Shields sold lot No. 258 of the same subdivision of Lonsdale, and situated near to the lots in controversy, to Rufus Ferguson at the price of $275. This agreement also provided that Ferguson was to pay for his lot in labor at $1 per day. Ferguson and Mitchell had one and two years in which to pay for their lots. On May 30, 1859, Shields assigned the two contracts with Mitchell and Ferguson to A. G. Jackson with the consent of both Mitchell and Ferguson. On January 6, 1862, Shields, Jackson, and Mitchell executed the deed to Elizabeth Ferguson heretofore referred to, which, after reciting the agreement between Mitchell and Shields for the purchase by Mitchell of lots 306 and 316 and the assignment by Shields of his interest in the agreement to Jackson, contains the following:

"Also that by the mutual agreement, and the acts of said Mitchell, Shields and Jackson the nature of the original agreement was changed subsequent to the date of the said assignment and in accordance with the terms and conditions of the change the said Mitchell executed to the said Jackson his promissory note for one hundred dollars, the payment of which note with interest by the said Mitchell having been agreed upon by all concerned, as the conditions upon which the said Shields and Jackson should relinquish all claim possessed by them in and to said lots three hundred and six and three hundred and sixteen now this indenture further witnesseth that the said Mitchell has paid or caused to be paid the promissory note together with all accrued interest; also the said J. C. Mitchell transfers for a valuable consideration all the right, title and claim and demand in him vested in and to the said lots 306 and 316 to Mrs. Elizabeth Ferguson, her heirs and assigns and will warrant and forever defend the title of said lots against the claims of all persons."

The necessary effect in law of this deed was to vest in Elizabeth Ferguson both the legal and equitable title to the lots in controversy, because the deed was signed by Shields, who held the legal title, and Jackson and Mitchell, who held the equitable title. On August 20, 1862, Elizabeth Ferguson conveyed the two lots to her husband by signing and privily acknowledging the following instrument:

"Whereas on the 6th day of January, 1862, John H. Shields and J. C. Mitchell executed to me, Elizabeth

Ferguson, a deed of conveyance for two certain lots, land therein described which deed is registered in Deed Book page 379 of the register's office of Knox county, and whereas it is agreed and desired by Rufus Ferguson, my husband and myself, that the title to said lots shall be vested in him, the said Rufus Ferguson:

"Now therefore, for the purpose of effecting the object aforesaid, I, the said Elizabeth Ferguson, do hereby transfer and assign and set over to my husband, the said Rufus Ferguson, the title of the lots described in said conveyance to myself; it being the intention of this instrument that the title of said lots shall vest in the said Rufus Ferguson in the same manner and to the same extent as if the conveyance had been made to him instead of me.

"For particular description of said lots reference is hereby made to the conveyance aforesaid to me.

"And I hereby acknowledge and agree that my said husband paid the consideration money for said lots, although the conveyance was made to me."

All of the foregoing instruments referred to in this statement of fact have been of record in Knox county for more than twenty years and more than thirty years before the filing of the bill in this case.

The facts recited in the deed to Elizabeth make it clear that Mitchell made a new arrangement with Jackson by and with the consent of Shields by which Mitchell was to pay for lots 306 and 316 the sum of $100, to be evidenced by his promissory note, instead of 600

days' labor at the price of $1 per day. It also makes it plain that this note has been "paid or caused to be paid" by Mitchell, and that Shields and Jackson were satisfied with the payment. Mitchell, Jackson, and Shields are strangers in blood to Elizabeth Ferguson. No reason appears from this instrument why such strangers would convey valuable property to the wife of another, unless the reason can be inferred from the statement that Mitchell had "caused the note executed to Jackson to be paid." This probably would be insufficient without more, but the deed of Elizabeth Ferguson to Rufus contains an express acknowledgment that Rufus paid the consideration money, although the conveyance was made to her.

If the recitals in the foregoing instruments are competent evidence against the complainants, they establish as a fact that Rufus Ferguson paid the consideration price and had the deed executed to his wife. Recitals are introduced into deeds for the purpose of explaining why the deed is executed or of showing circumstances to preserve the connection in the chain of title. Such recitals are usually treated of as two kinds, particular and general. Particular recitals are conclusive evidence of the facts recited in actions in which the purpose of the deed is directly involved. *George* v. *Bischoff*, 68 Ill., 236; *Usina* v. *Wilder*, 58 Ga., 178; *Mix* v. *People*, 86 Ill., 329. But, if the deed is merely collateral to the purposes of the action, recitals contained in it are only *prima facie* evidence of the facts recited. They are evidence, however, and

are receivable as such against the grantor and the grantee in the deed and all those claiming under them. Devlin on Deeds, vol. 2, sec. 992, *et seq.* The deeds from which the facts above stated are extracted are collateral merely to the purposes of this suit, and the recitals contained in them are only *prima facie* evidence of the facts stated, but there is nothing in the record indicating their falsity, so that we feel reasonably certain that they are true. They are particular and definite and are corroborated by the subsequent conduct of the parties. Therefore we have a case of the husband paying the consideration price for the land and directing the deed to be made to the wife. What is the nature of the estate which the wife takes?

The complainants insist that Elizabeth's estate was general, and that her husband was tenant by the curtesy, and, as he did not die until 1910, no statute of limitations has run against them; that defendants are life tenants merely, in possession under Rufus, and upon his death defendants' right of possession terminated and that of complainants accrued.

It is a general principle of equity that, when one buys land in the name of another and pays the consideration money, the land will be held by the grantee in trust for the person who so pays the consideration price. It is generally considered that this doctrine rests upon the natural presumption that he who supplies the money to pay for the land means the purchase to be for his own benefit; but this principle has its exceptions which are as generally recognized and ac-

cepted in courts of equity as the principle itself. As where a parent purchases land in the name of a child *prima facie* the purchase is deemed and intended as an advancement so as to rebut the presumption of a resulting trust for the parent. The law considers the moral obligation of the parent to provide for his children as of such consequence as to rebut the general presumption that the parent was buying for himself. And the same presumption exists in the case of a purchase by a husband in the name of his wife. Second Story's Equity, sec. 120.

It is therefore an established doctrine that, where the husband pays for land conveyed to the wife, there is no resulting trust for the husband, but the purchase will be regarded and presumed to be a provision for the wife. In a case similar in its facts to the one under consideration, the supreme court of Massachusetts used this language:

"Cases, which turn upon the general doctrine, that a gift to the wife is a gift to the husband do not apply to this case, which is a grant by the husband himself to the wife. The doctrine that a gift to the wife is a gift to the husband cannot apply where the husband himself makes a gift or grant to the wife, which surely cannot be taken as a gift or grant to himself. Besides, in all cases where the intention to give a separate property to the wife is manifest, that intention is to be carried into effect; and, where the husband himself makes a gift or grant to the wife, the intention to relinquish his own rights in favor of the

wife, and thus to give her a separate property or interest, is necessarily and most clearly and unequivocably manifested and declared. The cases, therefore, which have been referred to, to show that expressions such as those used in the power, do not create a separate property in the wife cannot apply to this case, while by these terms, as between the husband and wife, the intention of the husband to give a separate right and interest in the property to the wife is unequivocally declared, and such intention, by all the authorities, is to be carried into effect.'' *Whitten* v. *Whitten,* 3 Cush. (Mass.), 191.

To the same effect is the case of *Kimbrough* v. *Kimbrough,* 99 Ga., 134, 25 S. E., 176. In that case the court said:

"Where a husband with his own money purchased and paid for a home and deliberately and intentionally had the same conveyed to his wife, with no understanding or agreement that he was in any event to have an interest in the title, the transaction amounted to a gift from the husband to the wife, and as between them the property became absolutely her separate estate.''

Our own case of *Barnum* v. *Le Master,* 110 Tenn., 640, 75 S. W., 1045, 69 L. R. A., 353, establishes the proposition that a conveyance of lands made by a husband to his wife in the usual form, without any words indicating an intention to do so, has the effect in law to create a technical, separate estate in the wife. The reasoning of that case is full and cannot be added to

or strengthened by us. It is the leading case in this State upon the propositions stated and establishes beyond further controversy that the law conclusively presumes that in a conveyance made by husband to wife the husband intends that his act shall have the effect that it purports to have upon its face, and that is that he part with all his interest in the property conveyed. The rationale of that case is that the mere fact of the conveyance from husband to wife conclusively ascertains the husband's intention to be that the wife is to hold the property as her separate estate. The reasoning applies with equal force where the husband purchases real estate and pays the consideration price and directs that the conveyance be made to his wife without any reservation of his own rights as husband. Such an act excludes the thought that he intended the purchase for his own benefit.

We recognize the rule to be that, where a stranger conveys real estate to the wife, it is necessary for the use of apt words clearly expressing the intention to cut off the marital rights of the husband in order that the wife may have a separate estate. But those cases are not this case and should not be confused with it. Some of them refer to the grantor as a third party in connection with the statement of the rule referred to, but by that, we apprehend, is meant a stranger to the husband and the wife, and no reference is meant to transactions between the husband and the wife. The transaction is none the less between husband and wife because the husband has the grantor to convey directly

to the wife upon the payment of the purchase money by him rather than take a deed to himself and he convey to the wife. The substance, and therefore the intention, is the same, and it is the intention which must control. *Barnum* v. *Le Master,* supra. We are of opinion, therefore, that the deed of Shields and others to Elizabeth vested in her a technical separate estate. This being concluded, her deed to her husband with her proper privy examination was valid, and vested in him the title which she theretofore held. This latter deed being valid, the complainants have no interest in the land sued for, and the decree of the chancellor dismissing the bill is in all respects affirmed.

STATE, *ex rel.*, BOLT, *Sheriff v.* DRUMMOND *et al.*

(*Knoxville.* September Term, 1913.)

1. **COSTS. Statutes. Repeal.**

The Jarvis act (Laws 1897, ch. 20), which declares that neither the State nor any county shall be liable for costs or fees in any criminal prosecution, except in cases of certain felonies, or where the defendant has been sent to the workhouse under the small offense law, or where he has been convicted in a court of record and execution against him returned *nulla bona*, is a repeal by implication of all statutes, in force at the time of its passage, fixing liability upon the State or county for costs or fees in criminal prosecutions not within the exceptions. (*Post*, *p.* 274.)

Act cited and construed: Acts of 1875, ch. 43.

Code cited and construed: Sec. 449, subsec. 3 (S.); sec. 36 (T. S. and 1858).

Case cited and approved: Henley v. State, 98 Tenn., 706-8.

2. **STATUTES. Repeal. By implication.**

A repeal by implication can operate only where there is such a repugnance or conflict between the subsequent statute and an earlier one that the two cannot stand together. (*Post*, *p.* 274.)

Acts cited and disapproved: Acts 1899, ch. 307; Acts 1913, ch. 25.

Cases cited and approved: Hunter v. Memphis, 93 Tenn., 574; Blaufield v. State, 103 Tenn., 600.

3. **PRISONS. Care of prisoners. Sheriff's fees. Liability of county. "Boarding."**

The expression "boarding," as used in the Jarvis Act (Laws 1897, ch. 20), providing that neither the State nor any county thereof shall be liable in any criminal prosecution for any costs or fees, but that compensation for boarding prisoners shall be paid in all cases as heretofore, includes not only the compensation to which a jailer is entitled for furnishing prisoners with food,

bedding, and water, but for the keeping of such prisoners in custody; and hence the statute did not repeal Shannon's Code, sec. 6412, providing that jailers shall receive forty cents a day for each prisoner fed, and for each turnkey one dollar, but that only two turnkeys shall be allowed for each prisoner. (*Post*, *pp.* 275, 276.)

FROM KNOX.

Appeal from the Chancery Court of Knox County to the Court of Civil Appeals and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—WILL D. WRIGHT, Chancellor.

LINDSAY, YOUNG & DONALDSON, for plaintiff.

JOHNSON & COX, for defendants.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

This case was before the chancellor on the demurrer of Knox county to the original and amended bill of the sheriff, seeking in his right as jailer of that county a decree for turnkey fees, and compensation for food, water, and bedding furnished by him to certain prisoners lawfully committed to jail, and who there remained until lawfully discharged.

The questions raised by the demurrer are two: First, whether chapter 20, Acts 1897, known as the "Jarvis Law," extinguished the liability of the State or any county thereof for turnkey fees; second,

whether that act extinguished the liability of the State or any county thereof for any jailer's costs, including such as are sued for here, "where security has been accepted by the officer taking the security, and an execution afterwards returned *nulla bona* as to the defendant and his securities." The quotation above is from the first *proviso* of subsec. 3 of section 1, of the Jarvis Law.

The chancellor overruled the demurrer, his action was affirmed by the court of civil appeals, the case is before us on petition for *certiorari,* and errors here assigned by the county.

By section 360 of the Code of 1858—section 449, subsec. 3 of Shan. Code—it is made the duty of the sheriff to take charge and custody of the jail of his county and of the prisoners therein, to receive those lawfully committed, and to keep them himself, or by his deputies or jailer, until discharged by law. See, also, on the same subject section 5400, Code 1858, carried into Shannon's Code, as section 7375.

By chapter 43, Acts of 1875, carried into Shannon's Code as section 6412, it is provided that the several jailers in this State are entitled to demand and receive the following fees for services: "First, for each prisoner for whom he provides good, wholesome water, food, and bedding each day, forty cents. Second, for each turnkey, $1. Only two turnkeys shall be allowed for each prisoner."

So stood the law of the State upon this subject when the Jarvis Law was passed. The plan of legislation

embodied in that act was to extinguish the liability of the State or any county thereof for costs and fees under statutes in force at the time, except in cases described by class in subsections 1, 2, and 3 of section 1 of the act, and in section 2 of the act. The act is a clear repeal by implication of all statutes in force at the time of its passage fixing liability upon the State or any county thereof for costs or fees in any criminal prosecution in each case not falling within some exception in the act.

Such was the view of the act taken by this court in the case where its constitutionality was sustained. *Henley* v. *State*, 98 Tenn., 706-8, 41 S. W., 352, 1104, 39 L. R. A., 126.

The act is not an express repeal or amendment of any statute. None is mentioned, either in its caption, body, or otherwise. *Henley* v. *State*, supra.

Now, as a repeal by implication, it can operate only where there is such repugnance or conflict between its positive and material provisions and those of any existing statute that the two cannot stand together. *Hunter* v. *Memphis*, 93 Tenn., 574, 26 S. W., 828, and authorities there cited.

And the repugnance "must be very plain and unavoidable: Both the terms and the necessary operation of the two acts must be incapable of reconciliation before the older act will be repealed by the later one." *Blaufield* v. *State*, 103 Tenn., 600, 53 S. W., 1092, and authorities there cited.

In no sense is the Jarvis Law an act granting fees and costs in criminal prosecutions against the State or county. Its operation is restrictive of such rights already existing.

The substance of the second *proviso* of subsection 3 of section 1 of the Jarvis Law, in so far as that *proviso* relates to the compensation of jailers, is as follows:

"Provided that compensation for boarding prisoners shall be paid in all cases as heretofore."

We think the word "boarding" as used above, when construed in connection with the entire act and in view of the evils which the act was intended to cure, means compensation to the jailer, not only for furnishing water, food, and bedding to each prisoner, but also compensation to the jailer for locking each prisoner in the jail and keeping him locked therein, and liberating him therefrom upon proper authority so to do. The word "board" or "boarding" was not used in the legislation in the Code of 1858 nor in the act of 1875 to cover services for which the jailer was entitled to compensation. The word comes first into our legislation on this subject in the Jarvis Law.

Ordinarily, the word "boarding" might be said to mean furnishing water, food, and bedding, at least such might be its usual meaning where the boarder was not a prisoner; but we think we would defeat the manifest purpose of the act to give so narrow a meaning to the word. We can conceive of no reason why the jailer should be allowed for feeding, watering, and bedding a prisoner, and not also allowed for detaining him.

Each is a distinct service, and each an element of expense to the jailer.

Taking this view of the act, the word "boarding" would cover turnkey fees, as well as other services for which compensation was allowed by law to the jailer, which by the express terms of the Jarvis act were intended to be paid to the jailer after as they were before the passage of that act.

The construction above given the word "boarding" brings the compensation of the jailer for food, water, and bedding furnished each prisoner as well as for turnkey fees within one of the exceptions from the operation of the Jarvis Law; and, this being true, the Jarvis act does not repeal by implication the existing law allowing such compensation, and it necessarily results that the first *proviso* in subsection 3, of section 1, of that act has no application to the jailer's compensation here sued for, that being by the express terms of the Jarvis Law wholly excepted from its operation. To construe the act otherwise on this point would be to make it self-contradictory. Chapter 307, Acts 1899, and chapter 25, Acts 1913, amending the Jarvis Law, do not affect the present case.

What we have said meets each question made by the demurrer.

We think there was no error in the decree of the court of civil appeals, which affirmed that of the chancellor, and remanded the cause to the chancery court for answer by the county, and further proceedings. The decree is therefore affirmed.

TENNESSEE COAL, IRON & RAILROAD CO. *v.* PAINT ROCK FLUME & TRANSPORTATION CO.

(*Knoxville.* September Term, 1913.)

1. **EMINENT DOMAIN. Appropriation of land. Exclusive remedies.**

Where land has been occupied by a public service corporation, which did not exercise its power of eminent domain, the remedy given the landowner by Shannon's Code, sec. 1865, to petition for a jury of inquest to assess the damages, or to bring an action at law for damages, is exclusive, and the landowner cannot bring ejectment or enjoin the corporation from using his land. (*Post*, *p.* 282.)

Code cited and construed: Secs. 1861-1866 (S.).

Cases cited and approved: Colcough & N. & N. R. R. Co. v. Adams, 39 Tenn., 172; Tennessee & A. Co. v. Adams, 40 Tenn., 597; Railroad v. Cochrane, 71 Tenn., 479; Parker v. Railroad, 81 Tenn., 670; Saunders v. Railroad, 101 Tenn., 206; Doty v. Telephone & Telegraph Co., 123 Tenn., 329.

2. **EMINENT DOMAIN. Power of condemnation. "Public use."**

That the number of persons who can use, and that the area served by a flume company, down whose flume lumber and bark from the mountains is floated, is small, will not render the flume a nonpublic use, for a public use may be limited to the inhabitants of a small or restricted locality, and hence the legislature could properly delegate the power of eminent domain to flume companies. (*Post*, *pp.* 284, 285.)

Cases cited and approved: Gilmer v. Line Point, 18 Cal., 229; Talbot v. Hudson, 16 Gray (Mass.), 417; Township Board of Education v. Hackmann, 48 Mo., 243; Coster v. Tide Water Co., 18 N. J. Eq., 54; Pocantico Waterworks v. Bird, 130 N. Y., 249; Dietrich v. Murdock, 42 Mo., 279; De Camp v. Hiberina Underground R. Co., 47 N. J. Law, 43; Collier v. Railroad, 113 Tenn.,

96; Cotton v. Miss., etc., Boom Co., 22 Minn., 372; West Va. Transp. Co. v. Volcanic Oil Co., 5 W. Va., 382; Ryan v. Terminal Co., 102 Tenn., 111.

Cases cited and distinguished: Cozard v. Kanawha Hardwood Co., 139 N. C., 283; Phosphate Co. v. Phosphate Co., 120 Tenn., 260.

3. COURTS. Rules of decision. Previous decisions.

Since Acts 1875, ch. 142, entitled "An act to provide for the organization of corporations," and subsequent amendments (Acts 1887, ch. 16; Acts 1893, ch. 11), all of which were entitled "An act to amend an act to provide for the organization of corporations," were held constitutional, although they gave the various corporations organized thereunder the power of eminent domain, Acts 1901, ch. 138, entitled "An act to amend an act for the organization of corporations," and providing for the organization of flume companies, must be treated as constitutional, although giving such companies the right of eminent domain. (*Post*, *p.* 288.)

Acts cited and construed: Acts 1901, ch. 138; Acts 1875, ch. 142; Acts 1887, ch. 16; Acts 1893, ch. 11.

Cases cited and approved: Telephone Co. v. Telephone & Telegraph Co., 125 Tenn., 270; Kelly v. State, 123 Tenn., 516; Richardson v. Young, 122 Tenn., 471; State, ex rel., v. Nashville Baseball Club, 154 S. W., 1151.

4. STATUTES. Title of acts. Validity.

It being customary to endow public service corporations with the power of condemnation, an act entitled "An act to provide for the organization of corporations" has a broad enough title to embrace a grant of such power, and consequently an amending act, entitled "An act to amend an act entitled 'An act to provide for the organization of corporations,'" which gave the power of eminent domain to flume corporations, is not invalid, under Const., art. 2, sec. 17, because the body of the act is broader than its caption. (*Post*, *pp.* 289, 290.)

Case cited and approved: Memphis St. Ry. Co. v. State, 110 Tenn., 598.

5. INJUNCTION. Right to maintain injunction.

Even though a flume company was not authorized by law to appropriate water to run its flume, a riparian owner, who stood by and without objection allowed it to erect a valuable flume, which would be worthless without the water from his stream, cannot then enjoin such appropriation of water, for the granting of an injunction is always a matter of discretion, and the court should refuse one when it will destroy valuable property of one party without any corresponding benefit to another. (*Post*, *p.* 290.)

Cases cited and approved: Madison v. Cooper Co., 113 Tenn., 331; Bank & Trust Co. v. Hotel Co., 124 Tenn., 649.

6. INJUNCTION. Denial. Recovery of damages.

Where a riparian owner sought to enjoin a flume company from operating its flume, which it had placed through his land, without condemnation, and from appropriating the waters of a stream which ran through his property, and also damages, but alleged no ground of equitable jurisdiction save the right to injunctive relief, the denial of his injunction precludes the court of chancery from taking jurisdiction of his suit for damages. (*Post*, *p.* 292.)

Cases cited and approved: Bank & Trust Co. v. Hotel Co., 124 Tenn., 649; Swift & Co. v. Memphis Cold Storage Warehouse Co., 158 S. W., 480.

7. INJUNCTION. Right to maintain.

That a flume company organized as a public service corporation will not transport for the public generally is no ground for an injunction in favor of one whose land abutted on the stream which fed the flume and whose property had been taken without condemnation; the persons injured by the refusal of the company having their right of redress in appropriate proceedings, and the State having the right to dissolve the company for a breach of public duty. (*Post*, *p.* 293.)

FROM COCKE.

Appeal from Chancery Court, Cocke County.—Hal H. Haynes, Chancellor.

H. J. & W. D. McSween, for appellant.

Holloway & Hickey, for appellee.

Mr. Justice Green delivered the opinion of the Court.

This suit was brought by complainant, the Tennessee Coal, Iron & Railroad Company, to enjoin the defendant, the Paint Rock Flume & Transportation Company, from the occupation of complainant's land with a flume, and from diverting to said flume a portion of the waters of Paint Rock Creek. The bill also sought to recover damages from defendant. Answer was filed, and the chancellor dismissed the bill, and complainant has appealed to this court.

The defendant company was organized under chapter 138 of the Acts of 1901. This act provides for the incorporation of flume companies, and confers upon such companies the right of eminent domain, authorizing them to condemn "a right of way not more than thirty feet over the lands of private individuals in pursuance of the general law authorizing condemnation

of the easement of right of way for works of internal improvement as set forth in sections 1325 to 1348, inclusive, in the Code of Tennessee."

The said act also authorizes flume companies to erect and operate flumes "for the reception of and passage of water, for the floating of lumber, tan bark, and to do and perform the general duties of common carriers of goods so far as practicable." The act further provided that companies organized thereunder should furnish equal facilities to all persons without discrimination in service or charges, and imposed upon such corporations all the duties, responsibilties, and liabilities now resting on other *quasi* public corporations under the laws of the State of Tennessee.

It was averred in the bill that the condemnation proceedings by which defendant claimed to have acquired a right of way for its flume across complainant's land were irregular and illegal in several particulars. There has been much discussion in argument and briefs of counsel with reference to the said proceedings. We think, however, it is unnecessary at this time to consider the propriety of the methods used by defendant in obtaining this right of way. The flume has been erected and rightfully or wrongfully, defendant company has come into possession of a right of way across complainant's land, and is occupying the same with its flume.

Our Code provisions as they appear in Shannon's Compilation are as follows:

Section 1865: "No person or company shall, however, enter upon such land for the purpose of actually occuping the right of way, until the damages assessed by the jury of inquest . . . have been actually paid; or, if an appeal has been taken, until the bond has been given to abide by the final judgment as before provided."

Section 1866: "If, however, such person or company has actually taken possession of such land, occupying it for the purpose of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages as upon the trial of an appeal from the return of a jury of inquest."

This court has repeatedly held that the several remedies, given by our statutes to parties whose land has been occupied for purposes of internal improvement by public service corporations, are exclusive. That is to say, the landowner must obtain redress in the condemnation proceedings, or in an appeal therefrom (Shannon's Code, sec. 1861), or he may, upon his own petition for a jury of inquest, have his damages assessed, or he may sue for damages in the ordinary way (Shannon's Code, sec. 1866). He cannot bring a suit of ejectment against the corporation, nor is he entitled to an injunction which will have the effect of dispossessing such corporation from a right of way

already occupied by it. *Colcough* v. *N. & R. R. Co.*, 2 Head, 172; *Tennessee & A. Co.* v. *Adams*, 3 Head, 597; *Railroad* v. *Cochrane*, 3 Lea, 479; *Parker* v. *Railroad*, 13 Lea, 670; *Saunders* v. *Railroad*, 101 Tenn., 206, 47 S. W., 155; *Doty* v. *Telephone & Telegraph Co.*, 123 Tenn., 329, 130 S. W., 1053, Ann. Cas., 1912C, 167.

The flume company, therefore, if it be a public service corporation lawfully endowed with the right of eminent domain, cannot be deprived of the easement which it has obtained over the lands of complainant, even though it may have secured such right of way in an illegal manner. The complainant must look to its statutory remedies for redress.

The complainant, however, insists that the act conferring the right of eminent domain upon companies such as this is unconstitutional, for the reason, as it urges, that a flume is not a public use, and a flume company cannot be considered a public service corporation, or corporation for internal improvement, which may legally be clothed with the right of eminent domain. More particularly, as applicable to the facts of this case, complainant maintains that, at any rate, this defendant company is not undertaking to serve the public, and its flume is not devoted to the public use, nor adapted to such a use.

It appears that the Patterson Lumber Company owns a large body of timber in Cocke and Green counties in the mountains some eight or nine miles from the railroad. It was found very expensive to haul this timber out of the mountains to a place where it could

be transported to market. Persons interested in the ownership of the Patterson Lumber Company accordingly incorporated the defendant flume company, and proceeded to construct a flume from the property of the Patterson Lumber Company in the mountains to the railroad, a distance of about nine miles. The flume is fed by the waters of Paint Rock Creek, and is constructed along the banks of this creek, passing through the property of complainant for about one mile.

The proof shows that the greater part of the lumber, by far, that has been transported in this flume was the property of the Patterson Lumber Company. The flume company, however has transported lumber and bark for other patrons and exhibits certain contracts which it now has for further service to individuals other than the Patterson Lumber Company.

This flume runs from a rough and sparsely settled country. There is however, undoubtedly valuable timber and bark in this section, which can be gotten out much more readily by means of the flume than in any other way. While the greater part of this timber, bark, etc., is owned by the Patterson Lumber Company other parties, including the complainant, have extensive and valuable holdings in this locality, and the flume can be operated to the advantage of all these persons. Under its charter, the flume company is required to serve all such persons alike, without discrimination in charges or the character of service rendered.

We are of opinion that the fact that only a comparatively small number of people will be benefited

by the operations of this flume does not deprive the enterprise of its public nature.

A public use may be limited to the inhabitants of a small or restricted locality. *Gilmer* v. *Lime Point,* 18 Cal., 229; *Talbot* v. *Hudson,* 16 Gray (Mass.), 417; *Township Board of Education v. Hackmann,* 48 Mo., 243; *Coster* v. *Tide Water Co.,* 18 N. J. Eq., 54; *Pocantico Waterworks* v. *Bird,* 130 N. Y., 249, 29 N. E., 246.

An enterprise does not lose the character of a public use because of the fact that its service may be limited by circumstances to a comparatively small part of the public. *Dietrich* v. *Murdock,* 42 Mo., 279; *De Camp* v. *Hibernia Underground R. Co.,* 47 N. J. Law, 43.

A belt line railroad (*Collier* v. *Railroad,* 113 Tenn., 96, 83 S. W., 155) has been held by this court to be a public service corporation, although under the facts of that case it was apparent that said corporation could serve directly only a limited portion of the public. Although the number of persons who will be benefited by the operation of this flume is small, the section through which it passes being sparsely settled, nevertheless, it may be operated to the great advantage of all persons owning timber and bark in this community, and we are satisfied that such a flume may properly be considered as of public use.

Boom companies have been held to be lawfully endowed with the right of eminent domain. *Cotton* v. *Miss., etc., Boom Co.,* 22 Minn., 372; *Patterson* v. *Miss., etc., Boom Co.,* Fed. Cas., No. 10,829. So have oil

pipe lines (*West Va. Transp. Co.* v. *Volcanic Oil Co.*, 5 W. Va., 382), and canals and waterways (15 Cyc., 594 and cases cited).

As said in *Ryan* v. *Terminal Co.*, 102 Tenn., 111, 50 S. W., 744, 45 L. R. A., 303, anything which will "enlarge the resources, increase the industrial energies, promote the productive power of, or afford increased facilities for, the rapid exchange of thought or trade, or otherwise answer the growing needs of the community as such," may be treated as a public use, and, as before seen, the fact that the particular community served is small does not affect the question.

The legislature, therefore, was well within constitutional limitations in authorizing the incorporation of flume companies as public service corporations, and conferring upon such companies the right of eminent domain. These companies may be of the utmost advantage in this State, where we have numerous bodies of fine timber inaccessible to railroads, rivers, and other ordinary means of transportation. The fact that such companies generally serve sparsely settled communities is no reason for denying them the right of eminent domain. Such communities are as much entitled to the benefit of our statutes for internal improvements as are more populous communities.

Neither the case of *Cozard* v. *Kanawha Hardwood Co.*, 139 N. C., 283, 51 S. E., 932, 1 L. R. A. (N. S.) 969, 111 Am. St. Rep., 779, nor the case of *Phosphate Co.* v. *Phosphate Co.*, 120 Tenn., 260, 113 S. W., 410, 22 L. R. A. (N. S.), 701, are in point, although both

have been pressed upon the consideration of the court by counsel for complainant. In *Cozard* v. *Kanawha Hardwood Company,* as pointed out by this court in *Phosphate* v. *Phosphate Company, supra,* the defendants seeking to exercise the right of eminent domain proposed to use the railroad which they intended constructing for their sole and exclusive use in removing their timber and products from their own lands to the railroad station. In the case of *Phosphate Co.* v. *Phosphate Co.,* supra, this court observed that the phosphate company seeking to condemn a right of way sought such right of way for its exclusive use, and it was also said that the phosphate company was not a common carrier, and was in no sense a public service corporation.

It is next insisted that the act authorizing the incorporation of flume companies (chapter 138, Acts of 1901) is invalid under section 17, article 2, of the constitution of Tennessee, because the body of the act is broader than the caption.

The caption of this act is:

"An act to amend an act entitled 'An act to provide for the organization of corporations,' passed March 19, 1875, and to provide for the organization of flume companies."

In the body of the act, as heretofore seen, the right of eminent domain is conferred upon flume companies, and it is contended that such a provision is outside the scope of the act as indicated in its caption.

The general incorporation act (chapter 142 of the Acts of 1875) is entitled "An act to provide for the organization of corporations," and under this title there are provisions in the original act for the organization of railroad companies, telegraph companies, levee companies, and turnpike companies, upon all of which companies the act confers the right of eminent domain.

Chapter 16 of the Acts of 1887 is entitled "An act to amend an act entitled 'An act to provide for the organization of corporations,' passed March 19, 1875." This act provides for the incorporation of incline, cable, or cog railroad companies, and confers upon such companies the right of eminent domain.

Chapter 11 of the Acts of 1893 is entitled "An act to amend an act entitled 'An act to provide for the organization of corporations,' approved March 23, 1875, so as to authorize the organization of railroad terminal corporations, and to define the powers, duties and liabilities thereof." This act confers upon terminal companies the right of eminent domain.

From the foregoing it will be seen that since 1875 it has been supposed in Tennessee that a provision conferring the power of eminent domain upon a public service corporation was germane to the title of the general incorporation act of that year. In the original act, such provision was made with respect to four classes of corporations, and in at least two amendments to the act of 1875, as shown above, like provision has been made with reference to public service corpora-

tions, with nothing in the caption of any of the acts to especially indicate a grant of the power of eminent domain.

Under the authority of the original act, and these amendments, rights of way have been condemned and acquired in Tennessee of very great value. The act of 1875 and these amendments have been treated as constitutional, and as legally endowing the several corporations mentioned with the right of eminent domain for nearly forty years. This is a fit case for the application of the rule announced in *Telephone Co.* v. *Telephone & Telegraph Co.*, 125 Tenn., 270, 141 S. W., 845, 43 L. R. A. (N. S.), 550, namely: "It is a doctrine of the law that when acts have been long treated by the court as constitutional, and important rights have been based thereon, it may refuse to further consider the question."

See, also, *Kelly* v. *State*, 123 Tenn., 516, 132 S. W., 193; *Richardson* v. *Young*, 122 Tenn., 471, 125 S. W., 664; *State, ex rel.*, v. *Nashville Baseball Club*, 154 S. W., 1151.

It is, however, not necessary to invoke this doctrine. The caption of the act of 1875 indicates that it is an act to provide for the organization of every kind of corporation. It is known as the "General Incorporation Act." It being usual and customary to endow public service corporations with the right to condemn property necessary for their use, under a caption broad enough to justify a provision for the incorporation of such companies, a further provision for the right

of eminent domain is germane, and falls within the natural purview of such legislation.

So that this clause conferring the power of eminent domain upon flume corporations in chapter 138, Acts of 1901, is within the scope of the caption of chapter 140 of the Acts of 1875. The act of 1901 being an amendatory act, properly reciting the title of the original act of 1875, and containing matter embraced within that title, is a valid, constitutional enactment. The particulars of such an amendatory act need not be shown in its own title. *Memphis St. Ry. Co.* v. *State*, 110 Tenn., 598, 75 S. W., 730, and cases cited.

It is next insisted by the complainant that, if the constitutionality of chapter 138 of the Acts of 1901 be conceded, nevertheless, under said act, the flume company was without power to condemn water rights. The act in terms only authorized such companies to "construct, equip and operate flumes, and for this purpose" to have "the right to condemn a right of way not more than thirty feet over the lands of private individuals in pursuance," etc.

The complainant maintains that its rights as a riparian owner to the waters of Paint Rock Creek have been infringed by the defendant company; that a material portion of the water of said creek has been diverted to the use of the flume; that said creek was valuable to the complainant for water power; and that, accordingly, complainant is entitled to have defendant restrained from such appropriation of the water of said creek. The argument is that flume companies are

only authorized by the act of 1901 to condemn rights of way, and are without authority to condemn water rights. *Water Co.* v. *Scott,* 111 Tenn., 324, 76 S. W., 888, is cited for this proposition. By chapter 26 of the Acts of 1911, flume companies were empowered to condemn water rights, but this suit was originated prior to the passage of the last act. It is not necessary to consider the effect of the act of 1911 on the rights of the parties, as injunctive relief must be denied complainant for another reason.

It appears that the complainant had notice in advance of the erection and equipment of this flume and that the flume was to be constructed and operated with the waters of Paint Rock Creek. A letter from complainant's local counsel to an officer of complainant company is in the record, in which counsel speaks of the proposed flume, and states that his plan is to ignore the condemnation proceedings, and after the flume is erected to enjoin its operation.

Whether there was sufficient water power on the lands of complainant from this creek as it formerly existed to be of practical value is doubtful on the record. We do not think it was of much value. At any rate, it never had been utilized, and there is no indication that complainant ever intended to utilize it.

If this water power was worth anything under the facts we have set out, complainant should be remitted to its action at law to recover damages for any diminution of such power in consequence of the erection of

the flume. An injunction should not be awarded at this time against defendant.

Complainant stood idly by and permitted the building of this flume at a cost of about $20,000. The value of this water power to complainant as it formerly existed is not definitely established upon the record. The issuance of an injunction is always a matter of discretion with the court. The court should compare the consequences in considering the propriety of an injunction in a case like this. It should refuse to issue an injunction when the effect will be to destroy valuable property of one party without any corresponding benefit to the other.

Under the rules laid down in *Madison* v. *Copper Co.*, 113 Tenn., 331, 83 S. W., 658, and *Bank & Trust Co.* v. *Hotel Co.*, 124 Tenn., 649, 139 S. W., 715, 39 L. R. A. (N. S.), 580, complainant is not entitled to an injunction as herein prayed against defendant with respect to the use of the waters of Paint Rock Creek.

While complainant, in addition to the injunction sought, asks for the recovery of damages to its property, we do not think such damages can be allowed in this case. There was no occasion to apply to a court of chancery for relief on this account. There is no allegation of insolvency as to defendant company, nor is there any other ground of equitable jurisdiction, save the alleged right to injunctive relief. We have seen that the complainant is not entitled to an injunction. Therefore the only ground for equitable interference in the case has failed, and the chancery court

has no jurisdiction under such circumstances to determine mere matters of unliquidated damage to property. *Bank & Trust Co.* v. *Hotel Co.*, 124 Tenn., 649, 139 S. W., 715, 39 L. R. A. (N. S.), 580; *Swift & Co.* v. *Memphis Cold Storage Warehouse Co.*, 158 S. W., 480.

An effort has been made to show that the defendant flume company has been oblivious of its duties to the public and has conducted its operations almost exclusively in the interest of the Patterson Lumber Company. This is strenuously denied by the defendant. If these charges are true, parties injured can obtain redress by appropriate proceedings. Such misconduct on the part of defendant might furnish grounds for its dissolution at the suit of the State, but it furnishes no ground upon which to maintain the bill herein filed by complainant.

The chancellor's decree will be affirmed.

CAMP *et al. v.* RIDDLE *et al.*

(*Knoxville.* September Term, 1913.)

1. **ADVERSE POSSESSION. Possession of separate tracts.**

The possession of one of several adjoining tracts conveyed by the same deed was not constructive possession of either of the other tracts, where the tracts were separately described by the deed, and were not covered by one general boundary. (*Post*, *p.* 299.)

Acts cited and construed: Acts 1801, ch. 6, Sec. 48; Acts, 1837-38, ch. 176..

Code cited and construed: Sec. 5915 (S.).

Cases cited and approved: Haggart v. Ranney, 73 Ark., 344; Hardie v. Guaranty, etc., Co., 81 Ark., 141; Henry v. Brown, 143 Ala., 446; Quisenberry v. Chenault, 143 Ky., 312; Hornblower v. Banton, 103 Me., 375; Elliott v. Cumberland Coal & Coke Co., 109 Tenn., 745; McSpadden v. Starrs Mountain Iron Co. (Tenn. Ch. App.), 42 S. W., 497.

2. **JUDICIAL SALES. Sale by master. Effect of confirmation.**

A bid at a master's sale continues a mere offer until the court rejects it or accepts it by confirming the report of sale, but such confirmation only gives the purchaser an equitable title, the legal title not vesting until a deed is made by the master pursuant to a decree, or the lapse of a reasonable time after the master is ordered to make a deed, if he fails to do so. (*Post*, *p.* 301.)

3. **JUDICIAL SALES. Passing of title. Sale by master.**

A sufficient time did not, as a matter of law, elapse between December, 1876, when a decree directed a master to make a deed for land purchased at a judicial sale, and February 12, 1877, to vest legal title in the purchaser without a deed, under the rule that title will vest in a purchaser within a reasonable

time after a master is ordered to make a deed, if he does not do so. (*Post*, *p.* 303.)

4. EVIDENCE. Recital of deed. Effect.

Acts 1907, ch. 334, sec. 1, provides that all conveyances in an official capacity by a public officer, or one acting in a fiduciary relation, shall be admitted as *prima facie* evidence of the facts recited therein, so far as they relate to the execution of the powers of the office, and section 2 requires all such instruments of record when the act was passed, be admitted in accordance with section 1. *Held*, that recitals, in a master's deed to land belonging to an estate, that decedent left a will which authorized his executor to sell his interest in the land, and that the executor had sold such interest to a person named, to whom the deed purported to convey the legal title, were *prima facie* evidence of the facts recited. (*Post*, *pp.* 303, 304.)

Acts cited and construed: Acts 1907, ch. 334.

Case cited and approved: Hill v. Moore, 121 Tenn., 182.

5. EXECUTORS AND ADMINISTRATORS. Deeds.

A deed conveying estate land made by an executor to himself for a grossly inadequate consideration was voidable at the instance of the persons injured. (*Post*, *p.* 305.)

FROM BLOUNT.

Appeal from the Chancery Court of Blount County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—H. G. KYLE, Chancellor.

C. T. CATES, SR., and LINDSAY, YOUNG & DONALDSON, for appellants.

GAMBLE & CRAWFORD, and CULTON, MORRILL & WASHBURN, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The bill in this case was filed asserting title to three tracts of land lying in Blount county, one of 13,091 acres, another of 696 acres, and a third tract of 1,531 acres. The bill and answer agree substantially on the following facts: These lands were granted to one Foute, and were sold in 1868 in the chancery court of Blount county, in course of the settlement of his estate, in the case of the *Administrator of Foute* v. *Jane Foute et al.* They were purchased by eleven persons in equal undivided shares. One of these persons was John White, the ancestor of the defendants. The clerk and master made report of his sale to the June term, 1868, of the chancery court referred to, and the report was confirmed, but it does not appear that title was divested and vested by the decree of confirmation. The sale was partly for cash, but chiefly on long credit. At the December term, 1876, an order was entered on the minutes of the chancery court, directing the clerk and master to make a deed to the purchasers. He did not make this deed, however, until the 31st day of December, 1878, the deed reciting among other things, that the purchase money had then been all paid. Prior to this time, on February 22, 1877, John White died. Before his death he purchased one-fourth of an undi-

vided eleventh of the land from one of his copurchasers at the court sale. Uniting this with his original purchase, he owned at his death 5-44 of the land in controversy. One John H. Morton qualified as the executor of White. In the will which the latter left, he gave his executor power to sell his interest in the land, if needed for the payment of debts, or if the executor should otherwise deem it to the interest of the estate to effect such sale.

There is oral evidence, which was objected to, but not ruled on, in the trial court, to the effect that the executor, John H. Morton, sold the interest of his testator in the land for the sum of $104, and made a deed to himself, A. L. Wells, and B. A. Morton, as purchasers; Wells being his cousin, and B. A. Morton, his brother. Wells testified that a deed was made and duly acknowledged; that while he did not actually read the deed, and so was unable to state in terms its contents, yet he knew such a deed was made, on a printed form filled in, and delivered, but he does not know what became of it. It was never registered. The deed made by the clerk and master, Goddard, recites that the land had been sold by the executor to the persons already mentioned, and purports to convey the legal title of the John White 5-44 to them. Several of the persons interested in the original purchase at the master's sale testify that after the deed was made by him, John H. Morton, A. L. Wells, and B. A. Morton were always understood and treated as the purchasers and owners of that interest.

The testimony shows that the land was sold by the executor, to himself, and his aforesaid cousin, and brother, at the price of about four cents per acre, when in fact it was worth at the time in the neighborhood of one dollar per acre.

The complainants in their bill, while asserting title to the John White share, allege the loss of the deed said to have been made by John H. Morton to himself and others, claim this as a link in their chain of title, allege that its loss has cast a cloud upon their title, and ask to have this cloud removed by the setting up of that deed. They also allege that they had been in adverse possession of the land for more than seven years next before the filing of the bill, and were still in such adverse possession.

The bill alleges a connected chain of title from the Foute grants, through the chancery sale, and intermediate conveyances down to complainants. The answer admits the connected chain, save and except the deed alleged to have been made by Morton, executor. It denies that any such sale or deed was made, and avers that if they were made, such sale and deed were not only for an inadequate consideration, but also in express violation of the executor's duty, in selling to himself, his brother, and his cousin, under the circumstances stated, and hence void. The complainants do not allege that they were innocent purchasers.

As to the claim of title under the statute of limitations, the defendants deny there was such adverse possession. They also claim if there was any possession

at all, it was in harmony with their rights as cotenants with the complainants, and those under whom they claim.

The facts bearing on the subject of adverse possession are these:

The three tracts were conveyed by one instrument or deed, from time to time, but described in these deeds as separate tracts, and by distinct boundaries. A comparison of the boundaries shows that they lie adjoining each other. One witness says they lie side by side. There is general evidence to the effect that complainants have had tenants "upon the lands" for more than seven years, but no witness testifies to any possession upon any special one of the tracts, or so locates any possession as to enable the court to ascertain how this is. The defendants filed no cross bill.

The chancellor dismissed complainants' bill, and on appeal the court of civil appeals did the same. The case is now before us on *certiorari* to the latter court.

1. We shall first dispose of the question raised on the statute of limitations.

It appearing that, although the three tracts were conveyed by the same deed and adjoined each other, yet they were separately described and not covered by one general boundary, a possession on either one could not, by construction of law, be extended to cover either of the other two. This conclusion is supported by the weight of authority. 1 Cyc., 1128, and cases cited under note 54; also *Haggart* v. *Ranney*, 73 Ark., 344, 84 S. W., 703; *Hardie* v. *Guaranty, etc., Co.*, 81

Ark., 141, 98 S. W., 701; *Henry* v. *Brown,* 143 Ala., 446, 39 South., 325; *Quisenberry* v. *Chenault,* 143 Ky., 312, 136 S. W., 625; *Hornblower* v. *Banton,* 103 Me., 375, 377, 69 Atl., 568, 125 Am. St. Rep., 300, and note. This question seems never to have been presented in any case published in our State Reports, but it has been held that where tracts so adjoining are consolidated under one boundary in a deed, possession on one part will extend to the whole. *Elliott* v. *Cumberland Coal & Coke Co.,* 109 Tenn., 745, 71 S. W., 749.

It not being shown upon which specific tract the possession or possessions referred to in the evidence were located, but it being stated in a merely general way that they were "upon the lands," this cannot be treated as any proof of possession at all. This point and the former were so ruled in a case decided by the old court of chancery appeals of this State, and published in the Southwestern Reporter. A short excerpt from that opinion will present the matter fully. Thus: "Assuming that he lived upon either the Fore lands or the D. A. Cobb grant—one or the other—it does not appear which one. This is left in uncertainty. . . . The conveyance of the Fore lands and also of the D. A. Cobb lands were by the same deed, but by separate descriptions; and they were conveyed as distinct tracts, not as one tract and under one boundary. Therefore a possession upon the Fore land would not be extended so as to take in by construction the D. A. Cobb lands, either as originally granted or under the extended boundary already referred to." *McSpadden*

v. *Starrs Mountain Iron Co.* (Tenn. Ch. App.), 42 S. W., 497, 505. This case was affirmed orally by this court on October 27, 1897.

2. Our statute (Shannon's Code, section 5915 [Acts of 1801, chapter 6, section 48, Acts of 1837-38, chapter 176]), provides that courts having jurisdiction to sell land may either divest and vest title directly, or order the master (also designated clerk and master) to make a deed to the purchaser. In the old case in which the sale here under examination was made, it seems the latter course was taken.

Now what is the effect of the confirmation of the master's sale in such a case? The general custom in this State for many years has been to divest and vest title by the decree; and in many of our cases where the question has arisen collaterally, as in those settling the rights to rents between the purchaser and the defendant, former owner of the land, it seems to have been assumed that this was done, also in cases on petition to reopen biddings and others. But the general effect of our cases is that when a bid is made at the master's sale, this is a mere offer on the part of the proposed purchaser, continuing in its character and holding good, however, until the court acts on it either by rejecting it or accepting it; that this acceptance is manifested by the confirmation of the report of sale. The contract then becomes complete, and the purchaser is the owner of the land. Still he does not obtain the legal title by such confirmation unless the decree divests and vests title, or unless a deed is made

by the master pursuant to a decree ordering him so to do, or unless on being so ordered the master fails to make the deed within a reasonable time, in which latter event title will vest in the purchaser by the mere lapse of such reasonable time. On this last point see *Behrn* v. *White*, 108 Tenn., 392, 67 S. W., 810. We are not aware that our cases have clearly defined, or at any time have undertaken statedly to define, the *status* of a purchaser at a chancery sale who has merely a decree confirming the master's report without purporting to divest and vest title, and which contains no order on the master to make a deed. We are of the opinion that in such a case the purchaser obtains an equitable title, the full beneficial interest, with the bare legal title outstanding, which he has the right to obtain, on payment of the purchase money, or on performance of other conditions contained in the decree of confirmation, by application in the same case for an order on the master to make the deed, or by other supplemental proceedings to that end. Such was the *status* of John White and his associates after the date of the confirmation of the master's report at the June term, 1868, in the said case of *Administrator of Foute* v. *Foute*. By that confirmation they obtained the full equitable title or right, but the legal title was left outstanding.

We cannot say that sufficient time elapsed between December, 1876, when the order was entered, directing the master to make a deed to the purchasers, and February 12, 1877, the date of John White's death, to

justify the court in declaring that the title vested in John White because of such delay within the rule laid down in *Behrn* v. *White,* supra. At this distance of time we cannot say that the delay was unreasonable. We do not know that all the purchase money had been paid. We may infer from the recitals of the deed that this was not accomplished until about the time the deed was made. We are of the opinion that the reasonable time would expire, upon the master's failure to make the deed as ordered, after the payment of the purchase money.

3. We shall now consider whether the legal title passed under the facts stated.

The master's deed recites the death of John White; that he left a will which authorized his executor to sell his interest in the land; that his executor had sold this interest to A. L. Wells, B. A. Morton, and John H. Morton. Thereupon this deed purported to convey to these three persons the John White land, that is the legal title thereto. The recitals of this deed must be taken as *prima facie* true within the terms of the act of 1907, chapter 334, and the case of *Hill* v. *Moore,* 121 Tenn., 182, 113 S. W., 788, construing that statute. Section 1 of that act provides that all instruments of conveyance executed in an official capacity by any public officer of this State, or by any person occupying a position of trust or acting in a fiduciary relation, "shall be admitted, held, and construed in and by the courts of this State as *prima facie* evidence of the facts in such instruments recited in so far as such facts

relate to the execution of the powers of such office or trust.'' Section 2 provides that all such instruments of record at the time the act was passed must be ''admitted, held and construed in accordance with section 1,'' In *Hill* v. *Moore* the act was applied to a master's deed made on the 21st of January, 1902. The deed under consideration in that case recited the general purport of the decree under which a sale had been made by the master, his report of sale, the confirmation of the report, the payment of the purchase money pursuant to the requirements of the decree, and that in view of these facts the deed was made. The court said: ''From these recitals the court would presume, under the statute referred to, that the court that ordered the land so sold had jurisdiction of the parties and subject-matter, and, in short, that the clerk acted under due authority in making the deed. Under the statute referred to the burden would rest upon anyone questioning such authority to file a copy of the record to overturn the *prima facie* case made by the deed.''

The recitals contained in the deed now before the court state facts relating to the execution of the powers conferred on the master by the decree; that is, the power to make a deed to the purchasers. This necessarily included the assignees or vendees of the purchasers, since it was incumbent on the master to ascertain these as a necessary preliminary to making the deed. The recital, it is true, made only a *prima facie* case, but in the present instance there is no evidence to the contrary. Indeed these recitals are supported,

as shown in the statement of facts, by the testimony of A. L. Wells.

Now, passing for the present the question of setting up the lost deed, the inquiry occurs as to whether such relief is necessary to enable the complainants to obtain a decree asserting their title. We have seen that the legal title passed by the deed which the master made under the authority of the court. This deed was made to A. L. Wells, B. A. Morton, and John H. Morton as assignees of John White, along with the conveyance to the original vendees. From these and others interested in the original purchase the complainants have received, through mesne conveyances, the legal title, and they have the right to a decree so adjudging.

If it were necessary to set up the alleged lost deed the court could not grant affirmative relief because it appears that that deed was made for a grossly inadequate consideration, and was made by the executor in breach of his duty. Although so made, it was not absolutely void, but merely voidable, at the instance of persons injured thereby. The defendants, as stated, have filed no cross bill attacking the deed. It being unnecessary to set up that deed in order to declare the passage of the mere legal title, the duty of the court is to declare the passage of the latter, and leave open the question whether the equitable interest passed to the complainants, and those under whom they claim. The decree in the present case will therefore reserve to the defendants the right to hereafter file an original bill if they see proper to attack the *bona fides* of the

deed made by the said John H. Morton, executor. The court makes this reservation because of the odiousness of a deed made under the circumstances stated and the failure of the complainants to allege and prove that they were innocent purchasers. The court does not decide how far laches may interfere with the rights of the present defendants in such new proceeding or the contrary, or whether under all the facts there has been laches, or the contrary. We are of the opinion that complainants should pay all of the costs of the present proceedings, and the decree will so adjudge.

D. B. Loveman Co. *v.* Bayless.*

(*Knoxville.* September Term, 1913.)

1. **TRIAL. Joint defendants. Verdict for servant. Effect as to master.**

When a master is sued solely for misfeasance or nonfeasance on the part of his servants and is liable for their conduct only under the doctrine of *respondeat superior*, a verdict, permitted to stand in favor of such servants, either in the same action or in a prior action, entitles the master to a discharge from such claimed liability. (*Post*, *p.* 312.)

Cases cited and approved: Doremus v. Root, 23 Wash., 710; Stevick v. Northern Pac. R. Co., 39 Wash., 501; Norris v. N. W. Improvement Co., 53 Wash., 451; Sipes v. Puget Sound Electric Ry., 54 Wash., 47; Aldrich v. Inland Empire Co., 62 Wash., 173; McGinnis v. Chicago, R. I. & P. R. Co., 200 Mo., 347; Indiana Nitroglycerine, etc., Co. v. Lippincott Glass Co., 165 Ind., 361; Southern Ry. Co. v. Harbin, 135 Ga., 122; Chicago, St. P. & M. Co. v. McManigal, 73 Neb., 580; Montfort v. Hughes, 3 E. D. Smith (N. Y.), 591; Anderson v. Fleming, 160 Ind., 597; Hill v. Bain, 15 R. I., 75; Hayes v. Chicago Telephone Co., 218 Ill., 414; New Orleans & N. E. R. Co. v. Jopes, 142 U. S., 18, 24, 27, 12 Sup. Ct., 109; Gill v. Morris, 58 Tenn., 614; Bank of Commerce v. Porter, 60 Tenn., 447; Renkert v. Elliott, 79 Tenn., 235.

Cases cited and disapproved: I. C. R. R. Co. v. Murphy, 123 Ky., 787; G. C. & S. F. R. Co. v. James, 73 Tex., 12; Gardner v. Southern R. Co., 65 S. C., 341; Carter v. Southern Ry. Co., 93 S. C., 329.

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*As to whether a judgment in favor of employee bars recovery against employer for employee's act or default, see note in 54 L. R. A., 649. And upon effect of verdict for servant in action against master and servant for latter's negligence or misfeasance, see notes in 9 L. R. A. (N. S.), 880 and 30 L. R. A. (N. S.), 404.

2. TRIAL. Verdict for servant. Effect as to master.

Where a master is liable for an injury to a third person on grounds other than the misconduct of his servant, he may be held liable notwithstanding a verdict in favor of the servant. (*Post*, *p.* 317.)

Cases cited and approved: Jones v. Seattle, 51 Wash., 245; Aldrich v. Inland Empire Co., 62 Wash., 173; Clay v. Chicago, Milwaukee & St. Paul Railway Co., 104 Minn., 1.

3. APPEAL AND ERROR. Assignments of error. Necessity.

In an action against an employer and two of its employees for false imprisonment, assault and slander, in which a verdict was rendered against the employer and in favor of the employees, where it appeared that other employees not sued assisted in inflicting the injuries complained of, the supreme court could not, in the absence of an assignment of error that there was no evidence to support the verdict against the employer, examine the evidence for the purpose of determining whether there was evidence sustaining the employer's liability, aside from the evidence as to the conduct of the employees exonerated by the verdict, and hence would affirm the judgment. (*Post*, *p.* 318.)

FROM HAMILTON

Appeal from the Circuit Court of Hamilton County. —N. L. BACHMAN, Judge.

C. R. EVANS, for D. B. Loveman Co.

SHEPHERD, FLEMING & SHEPHERD, for J. B. Bayless.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

Bayless, the defendant in error, sued the D. B. Loveman Company, a mercantile corporation, and two of its servants, D. B. Loveman, its president, and D. C. Seymour, its superintendent, in an action of damages, in the circuit court of Hamilton county. The declaration contained eight counts, but presented only three distinct charges, false imprisonment, assault and battery, and slander, all rooted in the same transaction, or series of transactions. The defendants pleaded not guilty to all of the counts, but also interposed special pleas of justification as to the matter of slander charged, and another plea that the statements charged as slanderous were privileged.

There was evidence tending to show the following facts: Defendant in error was first employed in the store of the D. B. Loveman Company as a bundle wrapper, and while he was in this employment fifty cents was missed, which the company's agents supposed he had appropriated. He was called, taken aside, and told that a sale slip with the money had been traced to his balcony, and it could not be found in the cashier's possession, to which it was his duty to deliver it. He replied that it would appear as if he had it, and suggested that they search him. They did so, and found nothing. Shortly after this he was placed in charge of a room containing what was called the reserve stock; that from which the various departments of the store were, from time to time, replenished. About three weeks after he took charge of this reserve stock a head of one of the departments dis-

covered certain articles missing from boxes sent down from the reserve stock—a mirror, some combs, some soap, and a few other small articles. The superintendent, Seymour, began investigating. He found a mirror, and a comb and brush, and some writing paper, in defendant in error's locker, and that the mirror was afterwards put back into stock by defendant in error. All of these articles were in the locker of his predecessor; he merely removed them to his own when the latter left, not knowing they belonged to the stock, if in fact they did so belong. Mr. Seymour, however, believed that they had been stolen from the stock, and informed the president Mr. Loveman. The latter directed Seymour to search defendant in error, if he would consent to the search. Seymour called defendant, about closing time, into the clothing department, and had with him a superintendent of one of the departments, Mr. Campbell, to witness the transaction. When defendant in error reached the clothing department Seymour, in the presence of Campbell, asked defendant in error if he would submit to a search by him, or would he prefer to be searched by an officer, threatening defendant in error, in substance, with arrest if he did not submit to the search, and charged him with taking the articles already mentioned. Under these circumstances defendant in error submitted. The search disclosed nothing. When it was over defendant in error left the store in tears. Soon afterwards he brought the present suit.

The jury rendered a verdict against the corporation, and a verdict in favor of defendants Seymour and Loveman, thus exonerating them from all blame. Defendant in error made no motion for a new trial as to this latter verdict, nor in any way sought to disturb it. The plaintiff in error, the D. B. Loveman Company, moved for a new trial on sundry grounds, all of which were overruled by the trial judge, and judgment rendered against the plaintiff in error. An appeal was prayed and prosecuted to the court of civil appeals. That court passed on only one of the grounds for new trial, finding that sufficient for a disposition of the case, sustaining that ground and reversing the judgment, and remanding the cause for a new trial. The defendant in error then brought the case to this court by the writ of *certiorari*. The only question presented to the court is based on the action of the court of civil appeals in sustaining the motion for new trial on the point referred to. None of the other points relied on in the motion for new trial are before us.

The point sustained by the court of civil appeals, and presented there by an assignment of error in due form was in substance as follows:

That the verdict in favor of plaintiff in errors' servants who alone committed the acts complained of, if they were committed at all, for the commission of which plaintiff in error was sued, as their master, or principal, under the rule of *respondeat superior*, under which alone plaintiff in error could be held liable if at all, rendered the verdict against plaintiff in error

erroneous, and unsustainable, and entitled it to have that verdict set aside; the verdict against plaintiff in error being based solely on the same evidence under which the jury exonerated its servants.

In the petition for the writ of *certiorari* and accompanying brief the defendant in error denies the soundness of the contention, and also insists that, even if sound, it is not available to plaintiff in error because no error was assigned to the effect that there was no evidence to support the verdict.

Defendant in error insists that, conceding the soundness of the rule of law involved, still to make it available it is necessary to examine the evidence to ascertain whether there was any testimony that would hold plaintiff in error, notwithstanding the verdict in favor of its servants. On the other hand, plaintiff in error insists that it is necessary to refer to the facts only to test the applicability of the legal rule invoked, just as the correctness, or incorrectness, of a charge is tested by reference to the facts to ascertain the applicability of such charge or instructions.

To determine these controversies it is essential that we state the rule. It is, in substance, this:

When the master is sued solely for misfeasance, or nonfeasance, on the part of his servants, being liable for their conduct only under the doctrine of *respondeat superior,* a verdict, permitted to stand in favor of such servants, either in an action where they are sued with the master, or in a prior action, entitles the master to a discharge from such claimed liability. This

rule is supported by the great weight of authority. *Doremus* v. *Root,* 23 Wash., 710, 63 Pac., 572, 54 L. R. A., 649, and note; *Stevick* v. *Northern Pac. R. Co.,* 39 Wash., 501, 81 Pac., 999; *Morris* v. *N. W. Improvement Co.,* 53 Wash., 451, 102 Pac., 402; *Sipes* v. *Puget Sound Electric Ry.,* 54 Wash., 47, 102 Pac., 1057; *Aldrich* v. *Inland Empire Co.,* 62 Wash., 173, 113 Pac., 264; *McGinnis* v. *Chicago, R. I. & P. R. Co.,* 200 Mo., 347, 98 S. W., 590, 9 L. R. A. (N. S.), 880, and note, 118 Am. St. Rep., 661, 9 Ann. Cas., 656, and note; *Indiana Nitroglycerine, etc., Co.* v. *Lippincott Glass Co.,* 165 Ind., 361, 75 N. E., 649; *Southern Ry. Co.* v. *Harbin,* 135 Ga., 122, 68 N. E., 1103, 30 L. R. A. (N. S.), 404, 21 Ann. Cas., 1011; *Chicago, St. P. & M. Co.* v. *McManigal,* 73 Neb., 580, 103 N. W., 305, 107 N. W., 243; *Montfort* v. *Hughes,* 3 E. D. Smith (N. Y.), 591.

Illustrating the point: In *Doremus* v. *Root,* it was held that, in an action against a railroad company and its conductor for an injury caused by the alleged negligence of the conductor, a verdict in favor of the latter would preclude a judgment against the company. In *McGinnis* v. *Chicago, etc., R. Co.,* the action was based on the negligence of one French, a servant of the company employed in bridgework on the line. A verdict was rendered in favor of French, but against the company. It was held that in view of the former verdict the latter could not be sustained. In *Indiana Nitroglycerine, etc., Co.* v. *Lippincott Glass Co.,* it appeared that the action was based solely on the negligence of a servant, and both he and the master were

sued in the same action. The trial judge charged the jury: "There are two defendants in this case, and you may find for the plaintiff against both of them, or against one and for the other, or you may find for both of the defendants, as the preponderance of the evidence warrants." This was held error, on the ground that, inasmuch as the action was based solely on the negligence of the servant, there could be no liability of the master if the servant was not negligent. In *Southern Railway Co.* v. *Harbin,* the action against the company and the engineer on one of its trains was based solely on the negligence of the engineer. A verdict was returned in favor of the engineer, but against the company. It was held that the latter verdict could not stand, and the judgment based thereon was reversed. These illustrations will suffice. The principle is firmly established in even a wider application, as, for example, cases involving lessor and lessee sought to be held liable on the same cause of action (*Portland Gold Mining Co.* v. *Stratton's Independence,* 158 Fed., 63, 85 C. C. A., 393, 16 L. R. A. [N. S.], 677, and cases cited); in suits against cities for the negligence of one who had contracted to make a street improvement, where it appeared that a former suit against such person doing the work had failed (*Anderson* v. *Fleming,* 160 Ind., 597, 67 N. E., 443, 66 L. R. A., 119; *Hill* v. *Bain,* 15 R. I., 75, 23 Atl., 44, 2 Am. St. Rep., 873); in a suit against a city and a telephone company, for injuries caused by a broken wire maintained by the city on the company's poles (*Hayes*

v. *Chicago Telephone Co.*, 218 Ill., 414, 75 N. E., 1003, 2 L. R. A. [N. S.], 764). The reason on which the conclusion rests, in cases involving master and servant, is that where the servant by whose act the injury occurred is exonerated it is contradictory and absurd to find the master guilty on the same evidence; that the servant's liability is primary, that of the master secondary, or derivative, depending wholly on his duty to respond for the fault of his servant in the line of his employment, in the nature of a suretyship; that when the relations between the two are left undisturbed, the master has the right to recover over against the servant for any liability imposed upon the former by the misconduct of the latter, but if the latter be exonerated in an action between him and the injured person, this *status* is destroyed, and the master prevented from such recovery. As to the rationale of liability or nonliability, it is said in *New Orlean & N. E. R. Co.* v. *Jopes*, 142 U. S., 18, 24, 27, 12 Sup. Ct., 109, 111, 112 (35 L. Ed., 919), in which it was sought to hold a railroad company liable for the act of its conductor in injuring a passenger: "It would seem on general principles that if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity. . . . If the immediate actor is free from responsibility because his act was lawful, can his employer, one taking no direct part in the transaction, be held responsible? . . . The question carries its own answer; and it may be generally affirmed that if

an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor." The reason on which the other cases rests is that everyone is entitled to his day in court, and no more, on the same cause of action; that he has enjoyed this right when he has contested the matter with persons committing the wrong and primarily liable, and has been cast in such suit; that to permit him after this to contest the matter with one only secondarily liable would be to give him two suits upon the same cause of action. It is said to be a branch of the law of *res adjudicata,* but not requiring that the parties should be the same, or those strictly in privity. These questions have not previously arisen in our State except in cases involving principal and surety, and on this subject our authorities are fully in accord with the current of authority: *Gill* v. *Morris,* 11 Heisk. (58 Tenn.), 614, 27 Am. Rep., 774; *Bank of Commerce* v. *Porter,* 1 Baxt. (60 Tenn.), 447; *Renkert* v. *Elliott,* 11 Lea (79 Tenn.), 235, 249-255.

The case of *Moore* v. *Fitchburg R. Co.,* 4 Gray (Mass.), 465, 64 Am. Dec., 83 is cited as in conflict with the general doctrine. In that case it is true the court said it had nothing to do with the inconsistency of the verdict. However, the question covered by the cases above cited does not seem to have been in the mind of the court. *I. C. R. R. Co.* v. *Murphy,* 123 Ky., 787, 97 S. W., 729, 11 L. R. A. (N. S.), 352, is in conflict with the doctrine, and *G., C. & S. F. R. Co.* v. *James,* 73

Tex., 12, 10 S. W., 744, 15 Am. St. Rep., 743, seems also to be so. The earlier South Carolina cases (*Gardner* v. *Southern R. Co.*, 65 S. C., 341, 43 S. E., 816; *Bedenbaugh Southern R. Co.*, 69 S. C., 1, 48 S. E., 53) also take the opposite view, but the latest case from that State seems to be approaching the general view (*Carter* v. *Southern Ry. Co.*, 93 S. C., 329, 75 S. E., 952.) At least the court was equally divided. We are also referred to the doctrine that in actions against joint tort-feasors a judgment may be rendered against all of them or any one of them. But that doctrine has no application to a case like the one before us. Where the master is not present and participating, or has no other direct relation to the wrong or injury, but is only liable because of the doctrine of *respondeat superior*, he does not occupy the position of a joint wrongdoer.

The last proposition leads to the statement of a differentiation of the general doctrine we have been considering, to the following effect. If the evidence shows liability of the master on grounds other than the misconduct of his servant, he may be held, notwithstanding a verdict in favor of the servant. This principle was recognized in *Jones* v. *Seattle*, 51 Wash., 245, 98 Pac., 743; *Aldrich* v. *Inland Empire Co.*, supra, and *Clay* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 104 Minn., 1, 115 N. W., 949. In the case last cited there were two grounds of liability considered, the too great proximity of the depot platform to the passing cars, and the negligence of the conductor. The jury

rendered a verdict in favor of the conductor, but the court held this did not entitle the railway company to a discharge, since the other claim of liability remained for the jury to pass on as affecting the company's liability.

The defendant in error insists there is other evidence in the record to sustain the liability of plaintiff in error aside from the conduct of D. B. Loveman and D. C. Seymour, who were exonerated by the jury. It is insisted that there were two other agents of plaintiff in error who were not sued, Bratton and Campbell who assisted in inflicting the injuries upon defendant in error that are complained of, and that no estoppel in respect of their complicity arises out of the verdict. This is certainly a proper inquiry for the purpose of determining the applicability to the present case of the rule of law we have been considering. But to enable us to inquire, and also to enable us to determine generally that there is no evidence to support the verdict against the plaintiff in error aside from that which applied to the conduct of D. B. Loveman and D. C. Seymour, it is essential that we examine the evidence. But we are met by the rule that the supreme court cannot test the validity of a verdict by the evidence, except upon an assignment that there is no evidence to sustain the verdict, and there is no such assignment in the case before us. This rule is so well settled in this State that it needs no citation of authority. There being no such assignment, we cannot go into the evidence to see whether the case is of such

a character that it would justify us in applying the rule laid down in *Doremus* v. *Root*, and similar cases cited supra, although we have carefully read all of the evidence. From what has been said it is clearly apparent that plaintiff in error's contention is unsound; that we can solve the question by looking to the evidence only in such manner as the court examines evidence to determine the applicability of a contested instruction submitted to the jury by the trial judge.

It results that the judgment of the court of civil appeals must be reversed, and that of the trial judge affirmed.

W. J. Barton Seed, Feed & Implement Co. *v.* Mercantile National Bank *et al.*

(*Knoxville.* September Term, 1913.)

1. **BANKS AND BANKING. Collection of drafts. Nature of deposit. Intention of parties.**

In determining whether a draft was received by a bank for collection only, or whether it became the absolute owner, where it was deposited subject to check under an agreement that if returned uncollected the bank should charge it back to the depositor, the intention of the parties, as evidenced by their acts, controls. (*Post*, *p.* 323.)

2. **BANKS AND BANKING. Deposit of drafts. Conditional sale.**

Where a draft was deposited with a bank subject to check up to its face value the same as a cash deposit, under an agreement, however, that if it was returned uncollected the bank could charge the amount of the credit back, the transaction was at most a conditional sale of the draft to the bank, conditioned upon the collection of the draft. (*Post*, *p.* 324.)

3. **GARNISHMENT. Property subject. Bank deposits.**

Where a draft was deposited with a bank and full credit was given to the depositor as for a cash deposit under an agreement, however, that if the draft were not collected, the amount of the credit should be charged back to the depositor, the draft was subject to garnishment for the depositor's debts to the extent of his interest when the garnishment notice was served. (*Post*, *p.* 324.)

4. **GARNISHMENT. Bank deposits.**

Where a draft deposited with a bank as a pledge for credit given to the depositor is garnished by the depositor's creditors, the bank must show the extent of its interest in the draft in order

to protect its own interest therein from the garnishment. (*Post*, *p.* 325.)

5. CARRIERS. Bills of lading. Pledge as security.

Where a draft made upon the purchaser of goods was deposited in a bank by the seller with the bill of lading attached, and a checking credit was given to the depositor under an agreement to charge back the amount should the draft be returned uncollected, the bill of lading was merely security for the collection of the draft, whether it were made out to the consignee or to the shipper's order. (*Post*, *pp.* 326, 327.)

Case cited and approved: Bank v. Hayes, 119 Tenn., 729.

FROM WASHINGTON.

Appeal from Law Court of Washington County—DANA HARMON, Judge.

GEO. C. SELLS, for plaintiff.

VINES & PRICE, for defendants.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The facts, so far as it is necessary to state them, are as follows:

During the latter part of 1911, Toberman, Mackey & Co., dealers in hay and other provender in St. Louis, Mo., sold a lot of hay to Baldwin Feed & Implement Company of Johnson City, Tenn., at the price of

$318.50. On the 4th of January, 1912, they drew a draft on Baldwin Feed & Implement Company for this sum, in favor of Mercantile National Bank, of St. Louis, with bill of lading for the goods attached thereto. This draft was deposited in the bank, a credit therefor was entered on its books for the full face value in favor of Toberman, Mackey & Co., and also on the passbook of the latter, subject to check at the will of the depositor, in the usual way. At the same time numerous other items were deposited, aggregating, with that in question, the sum of $1,943.84. The transaction, however, affecting the draft now before us was consummated pursuant to the following course of business that had been current between the parties for three years or more: That is to say, Toberman, Mackey & Co. deposited with the bank, from time to time, drafts and checks on various points, for which they were given credit at face value, subject to check like cash deposited, with the agreement that if any of these papers should be returned at any time not collected, the bank had the right to charge back such items.

The Mercantile National Bank forwarded the draft and bill of lading to the Unaka National Bank at Johnson City, Tenn., for collection. The collection was made, but before the collecting bank could forward the money, it was attached in the hands of that bank, by garnishment process, as the property of Toberman, Mackey & Co., to enforce payment of a demand of about $295 asserted against that firm by the plain-

tiff, W. J. Barton Seed, Feed & Implement Company, of Johnson City, Tenn.

Such proceedings were had in the trial court as that the plaintiff recovered a personal judgment against Toberman, Mackay & Co., that firm having entered its personal appearance, for the sum of $200, but relief against the money attached was denied; that court adjudging that the money belonged to the Mercantile National Bank, which had intervened. The case was then appealed to the court of civil appears, where the judgment in favor of the Mercantile National Bank was reversed, and judgment rendered in favor of the plaintiff, subjecting the money attached to the satisfaction of plaintiff's debt and costs against Toberman, Mackey & Co. The case was then brought to this court on the writ of *certiorari.*

It was not shown that Toberman, Mackay & Co. had ever drawn on this deposit, or that the sum to their credit in the bank was ever at any time less than $318.50.

The question for decision is whether the Mercantile National Bank became the absolute owner of the draft, or whether the draft was received by it only for collection.

This is to be determined by the intention of the parties, as evidenced by their acts. We are of the opinion that the agreement to charge back in case the paper should be returned is a controlling consideration. It is irreconcilable with absolute ownership on the part of the bank. An agreement in advance to charge back

on failure of collection imports necessarily only a limited ownership, as in case of a bailment. Under the most extreme view, the drawing of the draft in favor of the bank, under the facts stated, could amount only to an agreement for a conditional sale of the paper; that is, that the property should belong to the bank in case collection should be made, but in case it should not be made, then the paper should revert to the drawer. At last this would be but an indirect way of stating a collection contract, when considered in connection with the deposit of the face amount of the draft, and the right accorded by the bank to check on the deposit. The substance of the transaction would be a loan of credit by the bank for the face value of the paper, based on the paper as security therefor, to be paid out of the collection when made; if not made, the paper to be returned, and the indebtedness to stand in favor of the bank, to be made good otherwise by the customer.

Some important consequences flow from this situation.

The paper is subject to garnishment for the debts of the customer, to the extent of the customer's interest at the time the garnishment notice is served. His interest is measured by the extent to which he has drawn on the deposit based on faith of the paper. If at any time there is to his credit on the books of the bank a sum less than that of the deposit, his beneficial interest in the paper is, to that extent, decreased. If at the date of the garnishment he has wholly drawn the

amount to his credit, he has no beneficial interest in the paper or its proceeds, and the garnishing creditor of the customer obtains nothing. It is the duty of the bank to show how the account stands, to the end that the extent of its beneficial interest in the paper may be known. The information is within its keeping, and it must make the facts appear. In brief, the bank holds the paper substantially in pledge for the credit extended, and it must show the extent of its interest when a creditor of the pledgor seeks to subject it as the property of the latter.

In the present case the bank has not shown that anything had been drawn from the deposit at the time the ganrishment notice was served on the Unaka National Bank. It must therefore be held that the fund collected on the draft was subject to garnishment as the property of Toberman, Mackey & Co.; the bank having under its control the amount credited to that firm, and having the right to protect itself therein.

It is insisted that when the collection was made the right of the bank in any event at that moment became absolute, and the right to charge back ceased. The right to charge back, however, at the inception of the contract, in connection with the credit then entered, determined the nature of the bank's interest. If at the date of such collection by a correspondent of the bank, and before coming to the hands of the bank, a garnishment notice is served, and the bank has paid out nothing on the deposit, it owes the customer the amount of the deposit, which it must yet pay to him or to his

creditors. It should be paid to his creditors in preference to himself, if they fasten their rights upon it in due and legal form. It is immaterial to the bank whether the deposit be garnished, or the fund which has been collected to cover that deposit. All that the bank can justly claim is that it be fully protected against loss. This protection is accomplished under the principles above stated. There may be some annoyance, and trouble to the bank, arising out of such a situation, but not more than such as may be consequent upon the creation of any pledge, and the advancing of money on the faith thereof. The bank can avoid every perplexity that may arise out of such a *status* by making an out and out purchase of the draft, bill, or note.

The parties have submitted extensive arguments on the relation of the bill of lading to the controversy. We see no occasion for this. The bill of lading was merely a security for the draft, only to be delivered to the consignee on payment of the draft. This is true whether the bill of lading be made out to the consignee directly, or to the shipper's order. In the first case, the bill of lading being attached to the draft, the consignee could obtain it only on payment of the draft. In the second case the drawee would, even upon payment of the draft, only be able to gain complete ownership of the property and rights represented by the bill of lading by having it indorsed or assigned to him by the shipper. In this latter case, it is not even necessary that a draft should accompany the bill of lading in order to protect the shipper's rights. It is sub-

ject to shipper's order, and the purchaser cannot obtain it from the carrier except upon his order. In the first case, the coupling of the bill of lading and the draft makes the sale of the goods and their delivery conditional upon payment of the draft. Under either form the rights of the seller, or of the assignee of the draft are fully protected.

It is further insisted that the present case is controlled by the case of *Bank* v. *Hays*, 119 Tenn., 729, 108 S. W., 1060, 14 Ann. Cas., 1049. This is a mistaken view. In that case it appeared there had been an out and out sale of the draft to the bank. On page 733 of 119 Tenn., on page 1061 of 108 S. W. (14 Ann. Cas., 1049), the court said: "These drafts were purchased by the complainant bank, and said grain company was given credit therefor by the bank, and checked against that credit in the regular way. According to the weight of the testimony, there was a straight purchase of these drafts by the bank; the drawers thereof reserving no interest in the property represented by the bill of lading."

The court of civil appeals reached the same result we have reached, but by a different line of reasoning. That court based its conclusion on the fact that Toberman, Mackey & Co. had shown great solicitude in the management of the matter in Johnson City, with a view to enabling the Mercantile National Bank to hold the funds collected on the draft. As pointed out in *Bank* v. *Hays*, supra, this is not a significant circumstance. "The grain company was, of course," said

the court in that case, "interested in seeing that the bank should get the benefit of the security, since the grain company would of course be liable to the bank for any default in the collection of these drafts. It was therefore natural that the grain company should have been active in trying to prevent the diversion of the rye from the claim of the bank to the claims of attaching creditors."

On the grounds stated herein, we are of the opinion that the result reached by the court of civil appeals was correct, and that its judgment should be affirmed.

HARRISON *v.* KNAFLE *et al.*

(*Knoxville.* September Term, 1913.)

1. **MECHANICS' LIENS. Time for filing notice. Completion of building.**

Under a contract for construction of a building, including the installing of a sprinkler system, to be approved by the State Inspection Bureau, the building is not completed, as regards the thirty days thereafter for filing notice of lien, till the work required by the bureau on its inspection is done. (*Post*, *pp.* 334, 335.)

Case cited and approved: Voightman v. Railroad, 123 Tenn., 463.

2. **BANKRUPTCY. Priorities. Liens.**

Relative to the question of certain creditors of a bankrupt contractor being entitled to priority as having filed notices of lien within thirty days of completion of a building, the bankrupt's trustee is bound by the agreement of the contractor and building owner in extending time for the completion. (*Post*, *p.* 338.)

3. **MECHANICS' LIENS. Time for filing notice. Enlargement of contract.**

Within the statute giving materialmen thirty days from completion of the work provided by the contract within which to file notices of liens, they have thirty days from completion of the work as enlarged by amendment of the contract between the owner and contractor, though part of their material was furnished before such amendment and all of it was for the work previously provided for by the contract. (*Post*, *p.* 339.)

FROM KNOX.

Appeal from Chancery Court, Knox County.—Will. D. Wright, Chancellor.

Jesse L. Rogers, for appellant General Fire Extinguisher Co.

J. Bailey Wray, for appellant Alex A. Scott Brick Co.

Culton & Morrill, for appellant Tennesse Mill & Mining Supply Co.

Green, Webb & Tate, for appellee.

Mr. Justice Lansden delivered the opinion of the Court.

Harrison is the trustee in bankruptcy of the S. M. Beaumont Company and filed this bill in the chancery court for the purpose of contesting with the General Fire Extinguisher Company, the Tennessee Mill & Mining Supply Company, and the Alex A. Scott Brick Company the claims of the latter to a furnisher's lien in certain fund paid into court by Knafle and wife to represent the value of two certain houses constructed for them by S. M. Beaumont Company, the complainant's bankrupt.

The question here is whether the lien claimants are entitled to priority in the fund representing the real estate over the general creditors of the bankrupt.

The Alex A. Scott Brick Company and the Tennessee Mill & Mining Supply Company furnished the ma-

terial used in the construction of the buildings, and the Fire Extinguisher Company installed an automatic fire extinguishing plant in the two buildings. It is not claimed that the Brick Company or the Supply Company have given thirty days' notice from the last date of materials furnished by them. It is claimed by them, however, that their notice was given within thirty days after the completion of the buildings, and this is likewise the claim of the Fire Extinguisher Company. Whether or not this is true depends upon the effect to be given to certain work done upon the sprinkler system December 26th, 27th, and 28th. The notice of each of the claimants was given within thirty days from those dates, but, if the work done upon the dates referred to does not fall within the contemplation of the building contract, notices are not within time.

This makes it necessary to state the contract between S. M. Beaumont Company, the principal contractor, and Knafle and wife, as the owners for the construction of the two buildings. The buildings were adjoining each other and were to be built on lots of a frontage of fifty feet each and according to plans and specifications prepared by certain architects and revised and approved by the contractor. These drawings and specifications were made parts of the contract. The original contract provided that "no payment made under this contract except the final payment shall be conclusive evidence of the performance of this contract, either wholly or in part, and no pay-

ment shall be construed as an acceptance of defective work or improper material.''

Soon after the execution of this contract, and before any material part of the work in the construction of the buildings was done, the parties agreed in parol to enlarge the terms of the original contract by providing that one of the buildings should have an adddi-tional story above the basement, and a complete automatic water sprinkler system should be put in both buildings, but as one system, by the contractor. The water sprinkler system was to be continuous through both buildings with one pressure tank and one supply pipe for the system. The contractor, after this enlargement of his contract with the owner, entered into a written contract with the Fire Extinguisher Company by which that company agreed to install the sprinkler system in accordance with a contract between the contractor and the owner. This contract provided that the material should be of standard quality and the work done in a thorough and workmanlike manner and in conformity with plans to be approved by the Tennessee Inspection Bureau. The specifications provided, after designating the number of automatic sprinklers, pipes, fittings, hangers, and the like, that it shall be installed ''in a thorough and workmanlike manner, and in strict conformity with the rules and requirements of the within-named insurance interests.''

It is also provided in the contract ''that it is the intention of this contract to cover a complete equipment in every respect and install in a manner that will

meet with the approval of the within-named insurance interests and Beaumont Bros., architects."

The evidence shows that one of these buildings was completed so that a tenant was placed in it August 1, 1912, and the other was completed and occupied by tenant November 6, 1912. The sprinkler system was installed in the two buildings in such manner that the foreman of the Fire Extinguisher Company believed it to be in compliance with the contract between that company and the principal contractor some time in October, and certainly in November, 1912. The sprinkler system was inspected by an inspector of the Tennessee Inspection Bureau, in October, and water was turned into the system November 6, 1912. Insurance was effected on the buildings November 6th, and the sprinkler system was believed by the insurance agent to be complete, judging alone, however, from its general appearance.

One of the buildings was used as a factory for the manufacture of overalls, pants, and the like, and, in the course of manufacturing these articles, it is necessary to use large tables upon which the garments are cut. These tables were installed after the building was leased to this tenant, and it became necessary to add a number of sprinkler heads under these tables because the tables cut off the protection to the floor which would be afforded by the sprinkler heads located in the ceiling over the tables. This work was done December 26, 27, and 28, 1912, and there is no claim by the lien claimants that this additional work

would fall within the contract between the parties so as to extend the time of their lien. The claim made by the lienors is that the contract for the construction of the sprinkler system required that the system be approved by the Tennessee Inspection Bureau before it was complete or would be accepted by the owner, and that the system as first installed was inspected by that bureau and disapproved until certain other things were done about it, and that this work was not done until the dates last named. The inspector reported the system equipment to be good in general, the piping well installed, and the heads arranged both staggered and in regular order; that the water supply was good; and that the equipment should control any ordinary fire originating in the building. The inspector also recommended that a sprinkler head located against a steam pipe be moved eight inches, and that a hanger should be placed on the end of the line; that certain crooked sprinklers should be straightened up, and all high heads should be lowered, so that the deflectors would be at least three inches below the bottom of the beams in the basement; that the alarm should be placed in proper working order and plugs inserted in drain valves. He also recommended that an additional head should be placed over the deck of the stairs on the second floor.

Under the authority of *Voightman* v. *Railroad*, 123 Tenn., 463, 131 S. W., 982, Ann. Cas., 1912C, 211, if the improvements suggested by the inspector were provided for by the contract for the installation of the

sprinkler system, and a material part of it, and this work was not properly done by the subcontractor, the building could not be considered as completed until after the improvements were made in December. If, however, it was merely an unimportant or an inconsiderable thing not of the essence of the contract, or if it was merely to supply defective material or to repair defective work, it would not extend the time for the furnisher's lien.

As to whether this work was necessary to make the sprinkler system a completed one and such as would be approved by the Tennessee Bureau of Inspection is a matter of proof. The witness Clark, foreman of the Fire Extinguisher Company, states at one place in his testimony that the plant could not be considered as completed unless the improvements recommended by the inspector were placed in order and the corrections made, and he says specifically that the work done December 26th, 27th, and 28th was necessary to complete the installation of the plant. This testimony is not entitled to great weight, in view of the fact that the witness had previously stated that, when the water was turned on November 6th, he regarded the system as completed within the meaning of the contract. It appears from this witness' testimony that the improvements suggested by the inspector were sent to the home office of the Inspection Bureau, and from there to the general office of the Fire Extinguisher Company, and from the office of the Fire Extinguisher Company to this witness, and that he received the designations for

improvement some time in November. He also says that the work of making these improvements was postponed by agreement between the owner and the contractor for the convenience of the tenant until the Christmas holidays. The inspector inspected the building October 19, 1912. At this time he directed certain improvements to be made in the sprinkler system, and he says that these improvements were necessary to be carried out by the Fire Extinguisher Company before the Inspection Bureau would recognize it as a completed system. He says that it would not be a standard system with the suggested improvements left off, and that he would not recommend it to the bureau until the "little defects" mentioned in the report were corrected.

He was asked if the matters of moving the sprinkler from near the radiator, fixing the alarm, and the use of the additional hangers were unimportant matters, and he replied that it would be necessary for these things to be done to complete the system, but that they were not as important as the installing of the extra heads under the work tables. It appears that, in order to lower the sprinkler heads in the basement so that they would be three inches below the beams, it was necessary to lower the pipes in the basement about twenty-five inches. He was again asked if all the improvements recommended by him were important, and he answered as follows:

"In inspecting we do not take into consideration whether they are important or not. They are sim-

ply necessary to get the maximum protection and might never be used, while again they might. . .. . Some of them were small matters. The question of putting an additional hanger on did not amount to as much as moving the head from the steam pipe. They simply meant additional protection to the occupant of the building and to the owner."

He again states that the system would not have been recognized until all of the improvements that were reported, after the inspection, had been put in and the recommendations carried out.

The learned chancellor held that the building was not completed until the improvements required by the Tennessee Inspection Bureau were put in by the Fire Extinguisher Company for the reason that the approval of the Inspection Bureau was of the essence of the contract between the Fire Extinguisher Company and the principal contractor, and that under the proof the importance, or expensiveness, or extensiveness of the improvements was not entitled to particular weight, because the approval of the Inspection Bureau was the thing that must be obtained by the Extinguisher Company before its contract was complete.

We think this is a correct view. The parties can by mutual consent make the completion of the building to depend upon any lawful event which may suit their purposes. The purpose of installing the sprinkler system was of course to reduce insurance rates, and under the testimony the insurance rate would be gov-

erned by the recommendation of the Inspection Bureau so far as this sprinkler system would affect it. So one of the chief values of the sprinkler system to the owner was its approval by the Tennessee Inspection Bureau. This could not be had without the work done in December.

While it is entirely true that the expense of making the improvements and the labor done in connection with them are very small items as compared with the cost and labor of installing the entire system, this does not necessarily mean that the improvements themselves are unimportant. The sprinkler system is intended to extinguish fire automatically by releasing the water under pressure in the pipes when the heat generated by a fire in the building is sufficient to put the system in operation. The sprinkler heads were to be so arranged that they would spray water over the entire surface of the building. It is thus apparent that it was of the first importance that the sprinkler head too near the steam pipe should be removed, and that the sprinkler heads in the basement too near the beams should be lowered so that the water, when released, would be sprayed over the entire area of the basement.

The delay in making these improvements from November until the Christmas holidays was agreed upon by the owner and the principal contractor, the complainant's bankrupt. It was entirely competent for them to make this agreement, and the complainant, as representing creditors, is bound thereby.

It is also insisted that the Brick Company and the Supply Company are not entitled to their liens for the reason that the installation of the sprinkler system in the two buildings was not part of the general contract for the erection of the buildings under which the Supply Company and the Brick Company furnished material. As stated, Mr. and Mrs. Knafle made a contract with the Beaumont Company to erect the two buildings referred to. The Beaumont Company was the principal contractor. Later this contract was enlarged so as to provide for an additional story upon one of the buildings, and the sprinkler system in both the buildings. This addition to the contract was made long before these two claimants furnished all of their material. We think it would be sticking in the bark to say that these claimants are not entitled to their liens upon notice filed within thirty days from the completion of the contract between the owner and the principal contractor simply because the contract between them had been enlarged before the claimants furnished all of their material. The statute says they shall have the lien if they give the notice within thirty days from the completion of the work provided by the contract. This they have done.

Other questions were disposed of orally.

DAY *v.* SHARP.

(*Knoxville.* September Term, 1913.)

COUNTIES. Officers. Eligibility and qualification. "Office."

Const., art. 2, sec. 25, provides that no person who has been a collector or holder of public moneys shall hold any other State office until he shall have accounted for and paid into the treasury all sums for which he may be liable. Shannon's Code, sec. 1069, excepts from eligibility to office defaulters to the treasury at the time of election and declares the election of such person void. Defendant's election to the office of trustee of a county was void because he was then a defaulter, and after a judgment by the inducting authority that he was ineligible, but that a vacancy was thereby created, he settled his default and was elected by the county court to such office. *Held*, on petition of resistance to his induction therein, that the word "office," as used in the constitution and statute, implied the right to exercise the functions of a public trust or employment and to receive the fees and emoluments belonging to it and to hold the place for the term prescribed by law; that "office for a term" was an entity; and that the removal of an officer for disqualification did not operate to divide the term or create a new and distinct term, so that the default and consequent disqualification did not merely affect a part of the term but made him ineligible for election by the county court to hold the remnant of the term. (*Post*, *pp.* 343-349.)

Code cited and construed: Sec. 1069 (S.).

Constitution cited and construed: Sec. 25, art. 2.

Cases cited and approved: Lewis v. Watkins, 71 Tenn., 174; State, ex rel. Childs, v. Dart, 57 Minn., 261; State v. Rose, 74 Kan., 262; United States v. Hartwell, 6 Wall., 385; People v. Duane, 121 N. Y., 367; People v. Ahearn, 196 N. Y., 221.

FROM CLAIBORNE.

Day v. Sharp.

Appeal from Criminal and Law Court, Claiborne County.—XEN HICKS, Judge.

JOHN P. DAVIS, for appellant.

PAUL E. DIVINE, and MONTGOMERY & MONTGOMERY, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

A. K. Sharp, claiming to be the holder of a certificate of his election to the office of trustee of Claiborne county at the regular August, 1912, election, presented himself with his certificate to the proper inducting authority for induction into the office. Thereupon W. C. Parkey, who was the then incumbent of the office of trustee and also a candidate for re-election, filed a petition in pursuance of the statute resisting Sharp's induction on the ground, among others, that at the date of the August election, and also at the date of Sharp's application to be inducted, he (Sharp) was a defaulter to the treasury as circuit court clerk of the county.

Upon hearing the case the inducting authority adjudged that by reason of said default, found to exist, Sharp was ineligible to hold the office of trustee, but further that a vacancy was thereby occasioned in the office of trustee; and this last finding was certified to the quarterly county court to the end that that body by an election by it might fill the office thus adjudged to be vacant. The quarterly county court proceeded

thereon to elect Sharp to the office in respect of which he had been held to be ineligible.

Sharp procured a certificate of election from the quarterly county court for induction thereon, and on its presentation W. N. Day interposed his petition of resistance as a citizen and taxpayer of the county on the ground that Sharp was a defaulter. Sharp, intermediate the popular election and the date of the election attempted to be held by the quarterly county court, settled his default in an effort to qualify himself for the office.

Defendant Sharp does not claim under the election at the polls in August, 1912; but, on the contrary, he insists that he acquiesces in the decree of the county court, the inducting authority, to the effect that he was on and after that election day a defaulter, and that the election was therefore void; and he insists that thereafter, and before his election by the quarterly term of the county court, his payment of the amount of his default rendered him eligible at the later election. He relies alone upon his election by the quarterly county court to fill the claimed vacancy.

It is an insistence of Day that Sharp could not make himself eligible by thus purging himself of the taint of the default. It is argued that it would be opposed to the policy as well as the provisions of the law to permit one, ineligible to office by reason of his default, to render himself eligible for the same office during the same term by a payment of the amount of his delinquency.

The constitution, art. 2, sec. 25, provides: "No person who heretofore hath been, or may hereafter be, a collector or holder of public moneys, shall . . . hold any other office under the State government, until such person shall have accounted for, and paid into the treasury, all sums for which he may be accountable or liable."

Code, Shannon, Sec. 1069, providing for eligibility to hold office, makes, among others, this exception:

"(4) Those who are defaulters to the treasury at the time of the election, and the election of any such person shall be void."

It was held in *Lewis* v. *Watkins*, 3 Lea, 174, 182, that the point of time to test the eligibility of the candidate is the day of the election, under the statute; that the constitution is differently worded and might admit of less rigid legislation. But, applying this test, did the settled default of Sharp operate to affect and render void what is claimed to have been his after-election by the quarterly court?

The purpose of the constitutional and statutory provisions may be said to be twofold: To discourage official defaulting to the treasury; and, where that has occurred, to encourage a purging thereof by settlement. Had Sharp settled his delinquency prior to the day of the August election, it seems clear that he would have been eligible. But were there, or could there have been, two distinct elections of Sharp to office during the period of the single term, the last of which elections may not be denounced as void or invalid?

In the case of *State, ex rel., Childs* v. *Dart,* 57 Minn., 261, 59 N. W., 190, it appeared that a county treasurer was removed in a proper proceeding for the misappropriation of public funds. Afterwards the board of county commissioners, which had authority to fill the vacancy, elected him to fill out the term. The question arose whether there was power in the board to thus reinvest him with the office. The court said: "The removal proceedings cannot be nullified or reversed in that manner. Such removal proceedings are not merely for the purpose of ousting the person holding the office; they include a charge that he has forfeited his qualification for the office for the remainder of the term. They are brought to declare a forfeiture of a civil right, his eligibility, his qualification to hold that office for the rest of that term. The proceeding is not brought for his removal from a day or a week or a month of his term, but for the whole of the remainder of his term. . . . Nothing less is involved in the proceeding. Whether the voters at the polls could condone the offense by which he forfeited his office it is not necessary here to decide. We are of the opinion that the county commissioners could not do so."

The same principle was announced in *State* v. *Rose* 74 Kan., 262, 86 Pac., 296, 6 L. R. A. (N. S.), 843, 10 Ann. Cas., 927, writ of error dismissed 203 U. S., 580, 27 Sup. Ct., 779, 51 L. Ed., 326, where it appeared that an officer by official misconduct during his term had forfeited his office, and the forfeiture had been judicially declared. It was held that the judgment oper-

ated to deprive him of the right to take or hold the office during the remainder of the term to which he had been elected, even under a re-election at the polls. The court said: "Suppose a county clerk, who was engaged in peculation with the connivance of the board of county commissioners, was removed from office; the board, which has the power to fill the vacancy, might be willing to give the defaulter a new lease of power to continue his frauds against the public until the end of the term, but to allow it to be done would be trifling with justice. No such purpose can reasonably be imputed to the legislature. Counsel for the defendant were inclined to concede that an officer removed for dereliction of duty could not be reappointed to fill the vacancy, but contended that a different rule obtains where provision is made for filling the vacancy by election. . . . The protection of the public is involved in the proceeding and judgment. Nothing in the statute suggests that electors, even, can condone the misfeasance, revive the forfeited right, or limit the effect or enforcement of a judgment of ouster."

It will be noted that in each of the cases the acts, résulting in disqualification, occurred while the term of office was current, while here the act of default to the treasury is argued to have been committed before Sharp's term as trustee began. He, however, continued in default to and within the period of time covered by that term, and he was adjudged disqualified for his default so existing. His attempt at absolution by payment was after the period covered by that term

had begun to run. Can this case be, on principle, differentiated?

In our opinion this question involves a consideration of what is the meaning of the word "office" used in the constitution and statute. The word has been held, in such connection, to imply the right to exercise the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place for the term prescribed by law. *State* v. *Rose,* supra; *United States* v. *Hartwell,* 6 Wall., 385, 393, 18 L. Ed., 830, 832; *People* v. *Duane,* 121 N. Y., 367, 375, 24 N. E., 845.

Office for a term has been described as an entity in so far as that a removal, for disqualification, of an officer does not operate to divide the term or create a new and distinct one. "In such a case the successor is filling out his predecessor's term; and, when the defendant re-entered the office and undertook to exercise its duties, he was simply serving a portion of the very term which the court had decided he was unfit to hold." *State* v. *Rose,* supra.

In *People* v. *Ahearn,* 131 App. Div., 30, 115 N. Y. Supp., 664 (1909), it was held that a removal conclusively determined that the officer was in legal contemplation an unfit person to continue to perform the public trust appertaining to his office during the term, and that the removal covered the entire term, so that it was not within the power of the board of aldermen of the city of New York to reinstate him to serve for the remainder of the term. On appeal from this judgment

of the appellate division, the court of appeals of New York, in writing for affirmance, through Judge Hiscock, said: "Doubtless we might say, as so earnestly urged by counsel, that the strict letter of the statute would be satisfied by a removal which ousted appellant from his office for a day or an hour until some appointing power could reinstate him. But if we consider the general scope and purpose of this statute we shall be led to the conclusion that the legislature must have contemplated and intended more than this, and that the language which it employed is susceptible of a construction which will carry out its purpose. . . . It is equally clear, and will doubtless be so conceded in anything which may be said or written on the other side of the question, that this purpose will be frustrated and the administration of the law turned into a farce if under it an official may be immediately reappointed and a removal turned into a mere temporary suspension. In order to avoid such a result, and keeping in mind the purpose of the statute, we are justified, in my judgment, in construing the removal for which it provides as meaning a permanent and lasting ouster for the entire remaining term of the incumbent from the office which he has been filling or whose obligations he has been found unable or unwilling to discharge. As was well said by Mr. Justice Scott at the appellate division, an office implies 'much more than the right to physically occupy a certain room, to exercise certain power, and to receive a prescribed emolument.' So far as its beneficial aspect was concerned, appellant's office

consisted of the right to enjoy certain powers, privileges, honors, and emoluments for a given term, and, when the statute prescribed that he should be removed, it may be construed to mean that he should be removed from and deprived of all that which thus made up his office, namely, the right to enjoy these things for and during the entire term for which he had originally been selected. It is, of course, true, as is urged by counsel, that we do not speak of removing an officer from his 'term' of office. But the right to enjoy for a certain period the privileges and profits of a given position is an important element of an office in its complete conception, and a removal from office under the conditions here present may fairly mean a dismissal for that period from those rights and privileges." *People* v. *Ahearn*, 196 N. Y., 221, 229, 89 N. E., 930, 26 L. R. A. (N. S.), 1153. In accord in its reasoning is Advisory Opinion, 31 Fla., 1, 12 South., 114, 18 L. R. A., 594, and *contra State, ex rel.*, v. *Jersey City*, 25 N. J. Law, 536.

Office or election to office being thus conceived of as impying not merely place but term or tenure as well, we are of opinion that the reasoning of the courts in the above-cited cases applies here; and that under the provision of the statute to the effect that the election to office "of any such person (defaulter) shall be void," an election of Sharp at the polls in August, 1912, if assumed, was not nullified for a period less than the prescribed term of the office, so far as Sharp was concerned as beneficiary. His default and consequent disqualification did not merely affect a part of the term.

The result is that he was not eligible to be elected by the quarterly county court to hold the remnant of that term.

The lower court held to the contrary. Its judgment is therefore reversed. Costs below and on appeal will be paid by A. K. Sharp.

NOE *et al.* v. MAYOR AND ALDERMEN OF TOWN OF MORRISTOWN.*

(*Knoxville.* September Term, 1913.)

1. **MUNICIPAL CORPORATIONS. Governmental powers. Exclusive franchise.**

The ordinances of Morristown, providing for the selection of places for the inspection of animals to be slaughtered for food and for their sale at such places, and confirming a contract with a company, which ordinances, when construed together, made the premises of that company the only place for the inspection and slaughter of animals, are void as not being within the powers conferred by the charter of Morristown (Acts 1903, ch. 103.) (*Post, pp.* 353, 354.)

Cases cited and approved: Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co. (C. C.), 24 Fed., 306; Detroit Citizens Street R. Co. v. Detroit R. Co., 171 U. S., 48.

2. **MUNICIPAL CORPORATIONS. Legislative control. Grant of franchise.**

The power to grant an exclusive franchise, even of the limited class which may be granted within the city, must be expressly conferred upon the municipality by the legislature. (*Post, p.* 354.)

3. **MUNICIPAL CORPORATIONS. Power to grant. Constitutional provisions.**

Under Const., art. 1, sec. 22, forbidding perpetuities, and monopolies, the legislature cannot confer upon a municipality the power

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*On the question of the power of the legislature in respect to municipal franchises, see note in 48 L. R. A., 485.

As to the power of a city to prohibit slaughtering except at certain places, see note in 24 L. R. A., 586.

to grant an exclusive franchise for the conduct of a business which is of common right. (*Post*, *pp.* 354-356.)

Constitution cited and construed: Sec. 22, art. 1.

Cases cited and approved: Memphis Street Railroad Co. v. City of Memphis, 44 Tenn., 406; Railroad Co. v. Memphis, 3 Shan. Cas., 198; City of Memphis v. Memphis Water Co., 52 Tenn., 495; Leeper v. State, 103 Tenn., 500.

4. MUNICIPAL CORPORATIONS. Governmental powers. Municipal slaughterhouse.

While the legislature might authorize a municipal corporation to establish a single slaughterhouse, to be conducted by its own agents, it would have to provide that all persons having animals to be slaughtered should have the right to resort to that place to do their own slaughtering, or to have it done by their own agents, or the act would be unconstitutional. (*Post*, *p.* 360.)

Cases cited and approved: Slaughterhouse Case, 16 Wall. (83 U. S.), 36; Gale v. Kalamazoo, 23 Mich., 344; City of Chicago v. Rumpff, 45 Ill., 90.

5. MUNICIPAL CORPORATIONS. Police power. Regulation of slaughterhouses.

The original ordinance of Morristown, providing for the selection of one or more places for the inspection and slaughtering of animals intended for food, when dissociated from the second ordinance and the contract selecting only one such place, recognizes that there may be more than one place of slaughter and more than one inspector, and is in the main sound. (*Post*, *p.* 361.)

6. MUNICIPAL CORPORATIONS. Police power. Delegation of municipality.

The provision of section 16 of that ordinance, conferring police power upon the inspector, is objectionable, as clothing him with powers which belong to the city, and not to an officer, except under ordinances defining his duty. (*Post*, *p.* 361.)

7. MUNICIPAL CORPORATIONS. Police powers. Delegation of municipality.

The provision of section 13 of that ordinance, giving an inspector absolute power to dispose of condemned meat as he might deem best for the public health, is objectionable, since that matter should be controlled by law, and not by the mere will of the inspector. (*Post*, *p.* 361.)

8. MUNICIPAL CORPORATIONS. Validity of ordinances. Prescribing weight of evidence.

The provisions of that ordinance that certain acts should be "sufficient" evidence, rather than "*prima facie*" evidence, that the goods were on sale, are objectionable. (*Post*, *p.* 362.)

Case cited and approved: Brinkley v. State, 125 Tenn., 371.

FROM HAMBLEN.

Appeal from and Error to Chancery Court, Hamblen County.—HUGH G. KYLE, Chancellor.

McCANLESS & COLEMAN and J. O. PHILLIPS, for plaintiffs.

EARNEST R. TAYLOR and W. N. HICKEY, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The bill in the present case was filed by certain butchers engaged in their business in Morristown, challenging the constitutionality of certain ordinances of the town.

The first ordinance was passed March 7, 1913, and provided in substance that the board should select one or more places for the inspection of animals intended for slaughter in Morristown, and for sale there for local food purposes. A subsequent ordinance was passed confirming a contract made with the Morristown Produce & Ice Company, whereby, when construed in connection with the original ordinance, the premises of the company referred to were made in substance and effect the only place for the inspection and slaughtering of such animals. No provisions were made for complainants, or others situated in the like case, to slaughter their own animals. On the contrary, it resulted, as a necessary construction of the two ordinances and the contract made part of the second ordinance, that the place of slaughter was to be under the sole control of the Morristown Produce & Ice Company, and the work to be done only by it; the animals to be killed at that company's place by it, after first being inspected there by the inspector selected by the municipality, and the meat to be likewise there inspected and slaughtered. After this the owners were at liberty to remove and sell it.

Did the mayor and aldermen have power to pass such ordinances?

1. While there is a limited class of exclusive franchises which may be granted within a city, the power to make such grant must be expressly conferred upon the municipality by the legislature. There are no such

special provisions in the charter of Morristown. Acts of 1903, ch. 103.

That such power can exist in a municipality only when expressly conferred by the legislature is clear under the authorities. 3 Abb. Munic. Corp., secs. 921-926; *Jackson County Horse R. Co.* v. *Interstate Rapid Transit R. Co.* (C. C.), 24 Fed., 306; *Detroit Citizens Street R. Co.* v. *Detroit R. Co.*, 171 U. S., 48, 18 Sup. Ct., 732, 43 L. Ed., 67.

The same rule was laid down by this court in the case of *Memphis Street Railroad Co.* v. *City of Memphis*, 4 Cold., 406, and *Railroad Co.* v. *Memphis*, 3 Shan. Cas., 198. But we do not know any cases in which such power may be conferred upon a city, even by the legislature, as to any occupation or business within common right, because even the legislature is forbidden to create a monopoly. The only cases wherein such power is conceded to the legislature in behalf of a city are those in which the business was not of common right. *City of Memphis* v. *Memphis Water Co.*, 5 Heisk., 495. In that case, as in many other cases, the distinction was taken that it was not a matter of common right for anyone to tear up the streets of a city to put in water mains and water pipes generally, a thing essential in establishing a water plant. We are referred to the case of *Leeper* v. *State*, 103 Tenn., 500, 53 S. W., 962, 48 L. R. A., 167, as a case in opposition to the view just stated, but an attentive examination of that case will show the contrary. The fundamental reason running all through the opinion of the court

in that case was that the public school system was an institution of the State, and the provision made for its schools in the way of making contracts with a single person for all the books to be used, and in fixing the prices at which they were to be sold, was merely a contract by the state similar to one under which supplies for one of its departments are secured. It was pointed out in that opinion that no restriction was placed upon the right of anyone to sell to any private school, and no interference whatever was attempted in respect of that matter. It is immaterial that prior to that time the legislature had not undertaken to provide for its schools. The same may be said of the penitentiary, and of the record books to be used in the offices of the secretary of State, the treasurer, and the comptroller. The fact that these officers have hitherto been permitted to buy from anyone they might deem proper could not forestall the right of the State to purchase supplies for either one of these departments from any individual, or to give him the exclusive right of selling to these departments—that is, to the State itself—under bids open to all dealers. In this respect the State would have the same right any other individual would have to buy supplies. In the case referred to the State advertised for bids, at which anybody that desired might offer books, with the understanding the State would select the books it deemed the best and the cheapest. The fact that the State did not itself pay for the books, but arranged for depots or depositories at which the patrons of the public schools

themselves might buy the books at the price fixed by the contract between the State and the wholesale dealer, could not alter the principle. So we do not doubt that a city, like a private corporation, or like an individual, even, might buy its individual supplies of stationery, work tools, etc., from any dealer it might choose. That, however, is a different question altogether from one in which the city undertakes to take charge of a business, which before was of common right, declaring that this should be conducted at only a single place and by a single person, and thereby debar all of us from engaging in that business. This would be a pure monopoly forbidden by our constitution, which reads:

"That perpetuities and monopolies are contrary to the genius of a free State and shall not be allowed." Article 1, sec. 22.

We are referred to the *Slaughterhouse Case,* 16 Wall. (83 U. S.), 36, 21 L. Ed., 394, as an authority in support of such a monopoly. That case does hold that it was within the power of the legislature of the State of Louisiana to establish such a monopoly as to the place where the slaughter was to be done, but distinctly pointed out that at that place everybody was permitted to do their own slaughtering, and the company in charge of the place was bound under heavy penalties to permit them. This distinction would render that case inappropriate as an authority here; likewise the fact that it was established by the legislature and not by a municipal corporation. Moreover, we are not prepared to admit that it would be within the power

of the legislature of a State even to create such a monopoly. The following from section 192 of McQuillin on Municipal Ordinances, containing an excerpt from the opinion of Judge Cooley in *Gale* v. *Kalamazoo*, 23 Mich., 344, 9 Am. Rep., 80, seems to us to state the true doctrine, subject to the qualification we state at the close of the next excerpt hereinafter quoted: "A contract with a village to build a market house and to put it under control of the village for ten years, in consideration that the rents thereof would be paid to the grantee, to appoint a person to superintend it, permit no other market house to be erected or used, nor articles specified sold elsewhere in the village during the ten years, was held void by the supreme court of Michigan as against public policy. The reasons for the doctrine are thus clearly given by Cooley, J., who delivered the opinion of the court: 'If a municipal corporation can preclude itself in this manner from establishing markets whenever they may be thought desirable, or from abolishing them when thought undesirable, it must have the right also to agree that it will not open streets, or grade or pave such as are opened, or introduce water for its citizens, except from some specified source, or buy fire engines of any other than some stipulated kind, or contract for any public work except with persons named; and if it might do these things, it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumera-

ble inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interest, might, in various directions, engage it in permanent contracts, which, while ostensibly for the public benefit, would impose obligations precluding further improvements and depriving the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless. For, if the village might bind itself to some market house for ten years, it might do so for all time to come; and if it might agree that improvements and conveniences of one class ought to be confined by contract to one quarter of the town, a reckless or improvident board might agree with a greedy or unscrupulous proprietor of town lots, that all improvements of every description should be so located or made as to conduce to his benefit, irrespective to the general good. . . . It is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that

free government, with restrictions for the protection of individual or municipal rights, could long exist without its recognition." In *City of Chicago* v. *Rumpff*, 45 Ill., 90, it appeared that the city was authorized by its charter to regulate and license the slaughtering of animals within its limits. Under this ordinance a particular building was selected for the purpose, and the right to do the slaughtering was committed to one person, to whom certain charges were to be paid by the persons who applied to him for his services, and every one had the right to so apply. This was attacked as a monopoly. The court said:

"The charter authorizes the city authorities to license or regulate such establishments. Where that body has made the necessary regulations required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have an opportunity of conforming to such regulations; otherwise, the ordinance would be unreasonable and tend to oppression. Or, if they should regard it for the interest of the city that such establishments should be licensed, the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of all such business. We regard it neither as a regulation nor a license of the business to confine it to one building or to give it to one individual. Such an action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly. It impairs the rights of all other persons, and

cuts them off from a share in not only a legal, but a necessary, business. Whether we consider this as an ordinance or a contract it is equally unauthorized, as being opposed to the rules governing the adoption of municipal by-laws. The principle of equality of rights to the corporators is violated by this contract. If the common council may require all of the animals for the consumption of the city to be slaughtered in a single building, or on a particular lot, and the owner to be paid a specific sum for the privilege, what would prevent the making a similar contract with some other person that all of the vegetables or fruits, the flour, the groceries, the dry goods, or other commodities should be sold on his lot, and he receive a compensation for the privilege? We can see no difference in principle.'' See, also, 2 Dillon on Munic. Corp. (5 Ed.), sec. 668, and note.

We do not doubt that the legislature might authorize a municipal corporation to establish either by purchase or rental a single slaughterhouse, to be conducted by the agents or employees of the municipal corporation itself. But such legislative acts, in order to be constitutional, would have to provide that all persons having animals to be slaughtered should have the right to resort to that place and do their own slaughtering, or have it done by their own agents, or by persons of their own selection.

It follows that the chancellor was correct in holding void the contract with the Morristown Produce & Ice Company.

It is said that he was inconsistent in maintaining the validity of the original ordinance, and at the same time in stamping the contract, which is made a part of the second ordinance, as void. The original ordinance, while containing some objectionable features, is in the main sound. It does not when dissociated from the second ordinance and the contract therein adopted, provide for the selection of a single place for the work, or the appointment of a single individual to do the slaughtering. It recognizes that there may be more places than one. It recognizes, also, that there may be more inspectors than one, providing, as it does, for an assistant inspector, who, however, the bill charges, was not appointed, and that the corporation would not appoint him. So it was possible, under the original ordinances, standing alone, to have several places of inspection, and several places of slaughter.

There are some points, however, about this original ordinance that we think are worthy of special observation. For example, section 16 clothes the inspector with police powers. These powers belong to the city itself, and not to an officer of the city, except under ordinances defining his duty. Under the same theory section 13 gives to the inspector the absolute power to dispose of "condemned animals and meat as he may deem best for the good of the public health." This is a matter that

also should be controlled by law, and not by the mere will of the inspector.

We are of the opinion that the strictures made on section 1 of the ordinance of March 7th, that certain acts shall be deemed "sufficient" evidence that the goods are on sale, are well taken. It would have been proper to write, in the place of "sufficient evidence," "*prima facie* evidence." *Brinkley* v. *State,* 125 Tenn., 371, 384-385, 143 S. W., 1120.

It results that the decree of the chancellor is affirmed in part, modified in part, and reversed in part. The effect of all of which is that the demurrer is overruled, and that the case must go back to the chancery court for hearing on the answer, and for further proceedings. The defendants will pay the costs of the appeal.

CAROLINA, C. & O. RAILROAD *v.* SHEWALTER.

(*Knoxville.* September Term, 1913.)

1. **APPEAL AND ERROR. Review. Reduction of verdict.**

The reduction of the verdict in an action for death, being upheld by the court of civil appeals, will not be interfered with by the supreme court. (*Post*, *p.* 365.)

Act cited and construed: Laws 1891, ch. 124; Revised Statutes, 1903, ch. 89.

Cases cited and approved: Fulgham v. Midland Valley Railroad Co. (C. C.), 167 Fed., 660; Walsh v. N. Y., etc., R. R. Co. (C. C.), 173 Fed., 494; Davidson-Benedict Co. v. Severson, 109 Tenn., 572; Mondous v. N. Y., N. H. & H. R. R. Co., 223 U. S., 1, 32 Sup. Ct., 169; Baker v. Bolton, 1st Camp., 493; Osborne v. Gillette, L. R. A. Exch., 88; Railroad v. Burk, Admx., 46 Tenn., 45, 52; Fowlkes v. Railroad, 64 Tenn., 663; Haley v. Railroad, 66 Tenn., 239; Railroad v. Daughtry, 88 Tenn., 721; Murphy v. New York & N. H. R. Co., 30 Conn., 184; Broughel v. Sou. New Eng. Telephone Co., 72 Conn., 617; Conners v. Burlington C. R. & N. Y. Ry. Co., 71 Iowa, 490; Worden v. Humeston & S. R. Co., 72 Iowa, 201; Dillon v. Great Northern R. Co., 38 Mont., 485; Van Amburg v. Vicksburg & P. R. Co., 37 La. Ann., 651; Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann., 824; The Corsair, 145 U. S., 335, 12 Sup. Ct., 949; Kearney v. B. & W. R. Co., 9 Cush. (Mass.), 108; Hollenbeck v. Berkshire R. Co., 9 Cush. (Mass.), 478; Kennedy v. Standard Sugar & Refinery, 125 Mass., 90; Moran v. Hollings, 125 Mass., 93; Mulchahey v. Washburn Car Wheel Co., 145 Mass., 281; St. Louis, I. M. & S. Ry. Co. v. Dawson, 68 Ark., 1; St. Louis, I. M. & S. Ry. Co. v. Stamps, 84 Ark., 241; I. C. R. Co. v. Pendergrass, 69 Miss., 425; Vicksburg, etc., R. Co. v. Phillips, 64 Miss., 693; Dillon v. Great Northern R. Co., 38 Mont., 485; Belding v. Black Hills R. Co., etc., 3 S. D., 369; Hansford v. Payne, 11 Bush. (Ky.), 380; Newport News, etc., R. Co. v. Dentzel, 91 Ky., 42; Givens v. Ky. Central R. Co., 89 Ky., 231; Sweetland v. Chg., etc., R.

Co., 117 Mich., 444; Kyes v. Valley Telephone Co., 132 Mich., 281; Oliver v. Houghton County Street Ry. Co., 134 Mich., 367; Brown v. Chg. & N. W. Ry. Co., 102 Wis., 137; Lehmann v. Folwell, 95 Wis., 185; Holton v. Daly, 106 Ill., 131; Chg. & E. I. R. Co. v. O'Connor, 119 Ill., 586; McCarthy v. Chg. R. I. & P. R. Co., 18 Kan., 46; Lubrano v. Atlantic Mills, 19 R. I., 129; L. & N. R. Co. v. McElwaine, 98 Ky., 700.

2. **DEATH. Cause of action. Statutes. Interstate commerce employee.**

Act April 22, 1908, known as the Employers' Liability Act, ch. 149, sec. 1, 35 Stat., 65 (U. S. Comp. St. Supp., 1911, p. 1322), declares a carrier by railroad liable in damages to a "person suffering injury" while employed by it in interstate commerce, or, in case of his death, to his personal representative, for the benefit of certain relatives. Section 9, added to such chapter by Act April 5, 1910, ch. 143, sec. 2, 36 Stat., 291 (U. S. Comp. St. Sup., 1911, p. 1325), provides that any right of action given by this act to a "person suffering injury" shall survive to his representative. *Held*, that section 9 creates no new cause of action, but merely preserves, by survival, the cause of action given the employee, and therefore has no application where there is an instantaneous killing, right of action for the killing in such case being given the personal representative. (*Post*, *p.* 367.)

Cases cited and approved: Fulgham v. Midland Valley R. R. Co. (C. C.), 167 Fed., 660; Walsh v. New York, etc., R. R. Co. (C. C.), 173 Fed., 494; U. S. v. Goldenberg, 168 U. S., 95.

3. **DEATH. Action for benefit of relatives.**

To authorize recovery for the benefit of the father of an adult son instantly killed while employed by a railroad in interstate commerce, under Act April 22, 1908, ch. 149, sec. 1, 35 Stat., 65 (U. S. Comp. St. Supp., 1911, p. 1322), merely declaring the company liable in damages, it must be shown the father had reasonable expectation of pecuniary assistance or support from deceased. (*Post*, *p.* 392.)

Carolina v. Shewalter.

Cases cited and approved: Michigan Central R. Co. v. Vreeland, 227 U. S., 59; American R. Co. v. Didrickson, 227 U. S., 145; Hutchins v. St. Paul M. & M. Ry. Co., 44 Minn., 5.

FROM SULLIVAN.

Appeal from Law Court, Sullivan County.—E. K. BACHMAN, Special Judge.

PHLEGAR, POWELL, PRICE & SHELTON, for appellant.

HARR & BURROW, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought by W. N. Shewalter, the father and administrator of Robert Shewalter, deceased, to recover damages for the death of the latter, a railroad fireman, who was killed in an accident on the line of defendant company while in its employ.

There was a verdict below for $15,000, remittitur of $5,000 directed, and judgment entered for $10,000. This judgment was affirmed by the court of civil appeals. The case is before us on *certiorari*, both parties petitioning. The administrator complains of the reduction of the verdict. We will not interfere in a matter of this sort, where the court of civil appeals has upheld the trial judge. We overrule all assignments of error on behalf of the railway company, ex-

cept those raising the question of the measure of damages under the act of congress known as the Employers' Liability Act, which we will now consider.

The suit was founded on the act of congress, known as the Employers' Liability Act (Act April 22, 1908, ch. 149, 35 Stat., 65 [U. S. Comp. St. Supp., 1911, p. 1322], and the amendment of April 5, 1910, ch. 143, sec. 2, 36 Stat., 291 (U. S. Comp. St. Supp., 1911, p. 1325).

The particular provisions of the act drawn in question upon this appeal are the following sections:

Section 1: "That every common carrier by railroad while engaged in commerce between any of the several States or territories, or between any of the States and territories, or betwen the District of Columbia and any of the States or territories, or between the District of Columbia or any of the States or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its care, engines, ap-

pliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Section 9: "That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

Section 9 was an amendment to the original act. It will be observed that by the provisions of section 1 heretofore two rights of action are given; the first to the injured employee, and the second, in case of death to his or her personal representative, for the benefit, etc.

In two cases arising in the circuit courts of the United States it was held that the first right of action, that given to the employee, would not survive to his personal representative in case of his death. *Fulgham* v. *Midland Valley Railroad Co.* (C. C.), 167 Fed., 660; *Walsh* v. *N. Y., etc., R. R. Co.* (C. C.), 173 Fed., 494.

As appears from the reports of the judiciary committees of the house and senate, the amendment was enacted to meet the effect of these two decisions, and to cause the survival of the original right of action given to the employee for injuries to his personal representative.

It is conceded upon this record that the death of Robert Shewalter was instantaneous, or practically so.

He was killed by the collision of the engine, upon which he was fireman, with a large boulder that had fallen from the mountain side, along which the train ran to the track below. The engine overturned, and probably rolled over him. The witnesses say he was killed outright.

In his charge to the jury, the circuit judge instructed them as follows:

"The statute of the United States, known as the Employers' Liability Act, under which this suit is brought, provides that 'the right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow, husband, or children of such employee; and if none, then to such employee's parents.' This means that all the rights the employee would have had for the injury received will, in the case of his death, go to his personal representative, for the benefit of his widow and children, if there be any; and if none, then for the benefit of his parents. In this case, if you shall find that plaintiff is entitled to recover, the elements of damage that would have survived to Robert Shewalter, had death not resulted from his injuries, will survive for the benefit of his father, he having left no widow, child, or mother. I, therefore, instruct you that, in an action for personal injuries, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by defendant's negligence, and a reasonable sum for the pain and suffering, if any be

shown, and also a fair recompense for the loss of what he would have otherwise earned at his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant, if such be shown. And this will be the measure of damages in this case, if you shall find for the plaintiff. In other words, the pecuniary value of the life of the deceased, Robert Shewalter, is to be determined, if you find for the plaintiff, upon a consideration of his expectancy of life, his age, condition of health and strength, capacity for labor, and for earning money through, skill in any trade, occupation, or business, and his personal habits as to sobriety and industry, all modified, however, by the fact that the expectation of life is at most only a probability based upon experience, and also by the fact that the earnings of the same individual are not always uniform. All of these elements are to be taken into consideration by the jury, and, after weighing them all, they should assess such amount of damages as may be sufficient to compensate for the loss of the life whose value they are attempting to estimate."

The point of the criticism directed at this excerpt from the charge is that it permits the jury to assess damages in this suit not only for the loss sustained by the plaintiff, the beneficiary of the suit, but also the actual damages inflicted upon the person and the estate of the deceased—the pecuniary value of the life of deceased.

It is insisted that, inasmuch as the death of the deceased was instantaneous, he sustained no damage him-

self, and no cause of action accrued to him which might survive; that plaintiff's only right of action here is under those provisions of the act which provide a cause of action for certain beneficiaries in case of death of the party injured; and that the only damages to which the plaintiff is entitled are those actually sustained by him.

The charge of the circuit judge was correct, under the statutes of Tennessee, and is in accord with the law as laid down in *Davidson-Benedict Co.* v. *Severson*, 109 Tenn., 572, 72 S. W., 967, and cases there reviewed.

This suit, however, is not brought under the statutes of this State, but is founded on the act of congress, and this act of congress, in the field which it covers, has been expressly held by the supreme court, *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S., 1, 32 Sup. Ct., 69, 56 L. Ed., 327, 38 L. R. A. (N. S.), 44, to supersede all State legislation, and to cover and control all matters arising thereunder.

It therefore becomes necessary to examine the federal statute and determine the measure of damages properly allowable under it in a suit like this.

Owing to the peculiar language of our acts relating to this subject, our decisions construing these acts unfortunately will be of little benefit to us in this investigation.

At the common law, as is well known, the right of action for damages for personal injuries perished with the death of the injured person. Such right did not survive in favor of anyone.

Another rule of the common law was that the death of a human being was not a matter that could be complained of as an injury by anyone, and no one was entitled to maintain an action for damages for the mere loss of life of another. Pollock Torts, 54; *Baker* v. *Bolton,* 1st Camp., 493; *Osborne* v. *Gillette,* L. R. A. Exch., 88.

The Parliament of Great Britain, and the legislatures of nearly all the State of this Union have passed acts to obviate and repeal these harsh common law rules. Some of these acts repeal the first rule, and provide that a decedent's cause of action against a wrongdoer shall survive. These are often called "survival acts." Other acts give substantially a new cause of action to certain relatives or persons dependent upon deceased for the loss they sustained by reason of the death. These acts are frequently spoken of as "death acts."

Quite often it appears that the States have passed both survival and death acts and they are sometimes contained in the same general statute. Such seems to have been the course taken by congress in the act here under consideration, after it was amended. The act provides for the survival of the original cause of action, and also provides a new action for death of the injured person in favor of certain designated beneficiaries.

As has been said before, the statutes of Tennessee upon this subject are unique, and this court has been at much pains to explain these statutes and lay down

rules for their interpretation. See review of our cases in *Davidson Benedict Co.* v. *Severson,* 109 Tenn., 572, 72 S. W., 967.

Tennessee statutes as contained in Shannon's Code are as follows:

"Sec. 4025. The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act or omission, or killing of another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or to his personal representative, for the benefit of his widow or next of kin, free from the claims of creditors."

Sections 4026, 4029, 4466, and 4469 contain other provisions with reference to such suits which are not material to this discussion. Under section 4025, it was formerly held by this court that damages were not recoverable where the killing was instantaneous. The court said:

"The killing of a man is not, of itself, a cause of civil action. Damages recoverable are for what was incurred or suffered while the person lived. If the killing be absolutely instantaneous, damages are not recoverable, for that would be giving damages for the mere act of killing." *Railroad* v. *Burk, Adm'x,* 6 Cold., 45, 52.

This holding of the court was afterwards overruled in *Railroad* v. *Prince,* 2 Heisk., 585, in which case, construing the statute, this court said:

"But does the section of the Code under consideration include and provide for a case in which the injury produced instantaneous death? The answer to this question must depend upon the intention of the legislature, as the same is to be ascertained from the language used. It will be observed that two classes of cases are provided for in the section connected together by the use of the disjunctive conjunction, 'the right of action which a person *has* who dies from injuries received from another.' This language describes one class of cases—those in which death results after the injuries received, but not instantaneously, as we understand the language. As to the second class, 'the right of action which a person, whose death is caused by the wrongful act or omission of another, *would have had* against the wrongdoer, in case death had not ensued, shall not be extinguished by his death.' This is the second class of cases. One class embraces right of action which the person *has* who dies from injury received; the other class rights of action which the person '*would have had* whose death is caused by the wrongful act or omission of another,' etc. The distinction between the two classes of cases is by no means clear. If there is any difference, it is this: That the language used in describing the second class more clearly includes cases of instantaneous death than that used in describing the first class; and we infer that the language was used in the alternative, with the view of more distinctly indicating the purpose of the legislature to include cases of instantaneous

death, as well as those of death ensuing from injuries previously received. But whether the legislature used the two different forms of expression for the purpose suggested or not, it cannot be controverted that the language, 'whose death is caused by the wrongful act or omission of another,' includes cases of instantaneous death; and language which immediately follows, '*would have had* against the wrongdoer, in case death had not ensued, shall not abate and be extinguished by his death,' necessarily means that the representative of the deceased person shall have a right of action, whether the deceased died after the injuries were received, or died simultaneously with the infliction of the injury which caused death; and this right of action is to be for the benefit of the widow or next of kin.''

After some further discussion, the court overruled the case of *Railroad* v. *Burk,* supra, in so far as that case construed the act to contain no provision for recovery of damages in cases of instantaneous death.

Railroad v. *Prince,* supra, has been followed in *Fowlkes* v. *Railroad,* 5 Baxt., 663; *Haley* v. *Railroad,* 7 Baxt., 239; and *Railroad* v. *Daughtry,* 88 Tenn., 721, 13 S. W., 698, and other cases. It has been conceded since the decision in *Railroad* v. *Prince* that our statute covered cases where the killing was instantaneous, by reason of the peculiar provisions of this statute pointed out in that case.

The Connecticut statute of chapter 193 of the Public Acts of 1903, provides:

"In all actions surviving to or brought by an executor or administrator for injuries resulting in death, *whether instantaneous or otherwise,* such executor or administrator may recover from the party legally in fault for such injuries, just damages not exceeding $10,000."

Prior to the passage of the above-mentioned act, 1903, the statute of Connecticut provided that "actions for injury to the person, whether the same do or do not result in death . . . shall survive."

The Connecticut court has been at pains to explain and point out the difference between the statutes of that State and those of other States to which we shall hereafter refer. *Murphy* v. *New York & N. H. R. Co.,* 30 Conn., 184; *Broughel* v. *Sou. New Eng. Telephone Co.,* 72 Conn., 617, 45 Atl., 435, 49 L. R. A., 404.

The Iowa statute contains some peculiar clauses, and the decisions construing the same do not appear to be in harmony. In so far as a recovery has been permitted under a survival statute in cases of instantaneous killing, such recovery seems to have been justified by reason of an old statute of that State which provided: "When a wrongful act produces death, the perpetrator is civilly liable for the injury." See *Conners* v. *Burlington C. R. & N. Y. Ry. Co.,* 71 Iowa, 490, 32 N. W., 465, 60 Am. Rep., 814; *Worden* v. *Humeston & S. R. Co.,* 72 Iowa, 201, 33 N. W., 629. See, also, Tiffany's Death by Wrongful Act (2 Ed.), sec. 75. For

a critical review of the Iowa cases, see *Dillon* v. *Great Northern R. Co.*, 38 Mont., 485, 100 Pac., 960.

In Louisiana, likewise, the decisions construing the survival act of that State seem to be somewhat out of harmony. In so far as these decisions authorize recovery of damages for instantaneous killings, they seem to rest upon the provisions of a statute which enacts that, "every act whatever that causes damage to another obliges him by whose fault it happens to repair it. The right of this action shall survive, in case of death in favor of the minor children or widow of the deceased," etc. See *Van Amburg* v. *Vicksburg & P. R. Co.*, 37 La. Ann., 651, 55 Am. Rep., 517, and *Hamilton* v. *Morgan's L. & T. R. & S. S. Co.*, 42 La. Ann., 824, 8 South., 586.

It will be observed in this connection that the supreme court of the United States, construing the Louisiana statute, held that, where a vessel met with an accident, and sank ten minutes later, drowning libelant's daughter, no action for her suffering and fright during such ten minutes, separate and apart from the cause of action arising out of her subsequent death, could be maintained. *The Corsair*, 145 U. S., 335, 12 Sup. Ct., 949, 36 L. Ed., 727.

The four States mentioned, Tennessee, Connecticut, Iowa, and Louisiana, are the only four, so far as we know, where damages have ever been allowed to be recovered under survival statutes, where death was instantaneous. In Tennessee and Connecticut, it is manifest from what we have said that this result was

reached owing to the peculiar statutory provisions in those States. As we understand their decisions, no uniform result has been attained in Louisiana or Iowa. To the extent, however, that survival statutes in those States have been held to justify recovery in cases of instantaneous killings, the decisions appear to be rested likewise on peculiar phraseology of statutes in force.

Reverting now to the act of Congress under consideration there does not appear to be any ambiguity in the language of the act of 1908 or the amendment of 1910.

The original act provided that carriers should be liable in damages to "any person suffering injury," and the amendment provided that this right of action given "to a person suffering injury" should survive. There seems to be small room for construction here. The provisions of this amendment of 1910, or survival act, as we may call it, are little different from the provisions of survival statutes in several of the States to which we shall now refer.

There are a number of statutes in Massachusetts, but the original act, which has been frequently construed by the courts of that State, provides that "the action for trespass on the case for damages to the person shall hereafter survive so that in the event of the death of the person entitled to bring such action, it may be prosecuted or defended by or against the executor or administrator in the same manner as if he were living." And construing this statute, the Massachu-

setts court, speaking through Chief Justice Shaw, said:

"The statutes suppose the party deceased to have been once entitled to bring an action for damages for the injury, and either to have commenced the action and subsequently died, or being entitled to bring it, to have died before exercising that right. The question is whether the provision cited applies to the case before us. In the first case, where the casualty relied on as the cause of action, and the death of the party injured was simultaneous, it seems clear that the right of action cannot survive. The case contemplated by the statute must be of such a nature that the party injured must himself have . . . had a cause of action. The cause of action must accrue during the lifetime of the party injured. Here there was no time, during the life of the intestate, at which a cause of action could accrue, because the life closed with the accident, from which a cause of action would have otherwise accrued." *Kearney* v. *B. & W. R. Co.*, 9 Cush. (Mass.), 108.

In a similar case, the same learned judge observed:

"The question, in deciding whether any case is within the statute, is whether the sufferer survived, that is, lived after the act was done, which constitutes the cause of action. Life or death, that is the test. If the death, was instantaneous, and, of course, simultaneous with the injury, no right of action accrues to the person killed, and, of course, none to which the statute can apply. But if the party survives, lives after it, the right of action accrues to him, as a person *in esse*, and his subsequent death does not defeat it, but, by operation of the statute, vests in it, the personal

representative." *Hollenbeck* v. *Berkshire R. Co.*, 9 Cush. (Mass.), 478.

The rule laid down in these cases is reaffirmed by the Massachusetts court in the following cases: *Kennedy* v. *Standard Sugar & Refinery*, 125 Mass., 90, 28 Am. Rep., 214; *Moran* v. *Hollings*, 125 Mass., 93; *Mulchahey* v. *Washburn Car Wheel Co.*, 145 Mass., 281, 14 N. E., 106, 1 Am. St. Rep., 458.

Under the constitution of Arkansas, art. 5, sec. 31, and by its statutes (Kirby's Digest, secs. 6285-6290), provision is made for the survival of causes of action for injuries resulting in death without peculiar phraseology.

The Arkansas court has held, in a suit for damages for the death of a child, that "the survival of the action depends upon whether the injured child lived after the act constituting the cause of action." *St. Louis, I. M. & S. Ry. Co.* v. *Dawson*, 68 Ark. 1, 56 S. W., 46; *St. Louis, I. M. & S. Ry. Co.* v. *Stamps*, 84 Ark., 241, 104 S. W. 1114.

The Mississippi Code of 1906, sec. 721, as amended by chapter 167 of the Laws of 1908, now provides: "The fact that death is instantaneous shall in no case affect the right of recovery." Prior to this amendment, a simple survival statute existed in Mississippi, and construing this statute, the supreme court of that State said:

"The evil of the common law was that all personal actions died with the person. The remedy of the statute is to cause the action or the right of action to sur-

vive to the personal representative. Whatever suit was maintainable by the deceased shall be held maintainable by the personal representatives of the deceased. But the deceased never had any personal action which could abate at common law, where the injury causing death and the death itself was simultaneous. It is impossible to conceive, at common law, of a right of action to be begun . . . by one who died instantaneously on being injured. If, as we have declared, the statute was framed to prevent the abatement of the right of personal action by the death of the injured person, then it bears its own natural construction upon its own face. And if no strained or hidden meaning is to be imparted to the language of the statute, the survivorship is to personal actions which the testator or intestate might have commenced and prosecuted. But the testator or intestate could never have begun or prosecuted an action for injuries which ended in instantaneous death." *I. C. R. Co.* v. *Pendergrass,* 69 Miss., 425, 12 South., 954; *Vicksburg, etc., R. Co.* v. *Phillips,* 64 Miss., 693, 2 South., 537.

In Montana there was some discussion as to whether their statute was a survival statute. The court held that it was, and, after an exhaustive review of the authorities, concluded, referring to deceased: "As his death was instantaneous, it seems it was impossible that such a cause of action could arise in his favor for the wrongful act which caused his death, and, as such cause of action did not arise prior to his death, we hold that there was not any survival of a right of

action." *Dillon* v. *Great Northern R. Co.*, 38 Mont., 485, 100 Pac., 960.

The South Dakota statute provides that, if the life of any person shall be lost, "the personal representatives may institute suit and recover damages in the same manner that the person might have done for any injury where death did not ensue." Section 5498, Comp. Laws 1887. The court held that this was a survival statute, and, when death was instantaneous with the accident, no right of action accrued to deceased, because his life closed with the accident, and none could therefore accrue to his personal representative. *Belding* v. *Black Hills R. Co., etc.*, 3 S. D., 369, 53 N. W., 750.

Under the Kentucky General Statutes 1873, ch. 10, providing for any person injured, with certain exceptions, an action might be brought or revived by the personal representative in the same manner as a cause of action founded on contract, it was held that there must be an appreciable interval between the infliction of injury and the death, and that no recovery could be had where the death was practically instantaneous or immediate. *Hansford* v. *Payne*, 11 Bush. (Ky.), 380; *Newport News, etc., R. Co.* v. *Dentzel*, 91 Ky., 42, 14 S. W., 958.

We do not understand that *Hansford* v. *Payne* has been overruled by the later case of *Givens* v. *Ky. Central R. Co.*, 89 Ky., 231, 12 S. W., 257. The suit in the later case was based upon a different statute.

In Michigan both a survival statute and a death statute exist. It has been frequently held there that, if death is instantaneous, the administrator can recover damages under the death statute alone, and that, if death is not instantaneous, he can recover only under the survival statute. *Sweetland* v. *Chg., etc., R. Co.*, 117 Mich., 329, 75 N. W., 1066, 43 L. R. A., 568; *Dolson* v. *Lakeshore, etc., R. Co.*, 128 Mich., 444, 87 N. W., 629; *Kyes* v. *Valley Telephone Co.*, 132 Mich., 281, 93 N. W., 623; *Oliver* v. *Houghton County Street Ry. Co.*, 134 Mich., 367, 96 N. W., 434, 104 Am. St. Rep., 607, 3 Ann. Cas., 53.

In Maine it was formerly provided that any railroad corporation, by whose negligence the life of any person in the exercise of due care was lost, should forfeit not more than $5,000, nor less than $500, to be recovered by indictment to the use of persons specified, the remedy by indictment being applicable to only a small class of persons. An indictment could be maintained only in cases of instantaneous death. In other cases, an action was maintainable for the recovery of such damages as the party injured might have recovered had he lived under the survival act, now Revised Statutes 1903, ch. 89, sec. 8. In 1891 the legislature passed a death act (Laws 1891, ch. 124, Revised Statutes 1903, ch. 89, secs. 9, 10) substantially on the lines of Lord Campbell's Act, which, by implication, repealed the remedy by indictment. The construction given to the statute providing a remedy by indictment was adhered to, however, in so far that it

is held that the death act is limited to cases where the person injured died immediately, upon the ground that the legislature must have intended by this act to extend the means of redress to a class of cases where none existed before, and not to begin two actions for a single injury, one for the benefit of the decedent's estate, and another for the benefit of the widow and children, or next of kin. Tiffany's Death by Wrongful Act (2 Ed.), sec. 43, and cases there cited.

In Wisconsin, which has both a death act and a survival act, the precise question here under consideration does not seem to have arisen, but the Wisconsin court has held that the length of time a decedent survives after the injury is material in estimating the damages recoverable. *Brown* v. *Chg. & N. W., Ry. Co.*, 102 Wis., 137, 77 N. W., 748, 78 N. W., 771, 44 L. R. A., 579; *Lehmann* v. *Folwell,* 95 Wis., 185, 70 N. W., 170, 37 L. R. A., 333, 60 Am. St. Rep., 111.

In some of the States it is held there can be no recovery under a survival statute at all, except in cases where death results from some cause other than the injury. It is said in those States that the death statutes are intended to cover every case where death results from the injury, whether immediate or otherwise. *Holton* v. *Daly,* 106 Ill., 131; *Chg. & E. I. R. Co.* v. *O'Connor,* 119 Ill., 586, 9 N. E., 263; *McCarthy* v. *Chg. R. I. & P. R. Co.,* 18 Kan., 46, 26 Am. Rep., 742; *Lubrano* v. *Atlantic Mills,* 19 R. I., 129, 32 Atl., 205, 34 L. R. A., 797. Also see *L. & N. R. Co.* v. *McElwaine,*

98 Ky., 700, 34 S. W., 236, 34 L. R. A., 788, 56 Am. St. Rep., 385.

From the foregoing review of the cases, it may be taken as well-settled law that no right of action passes to the personal representatives of a deceased person where the killing was instantaneous, under statutes which provide simply in general terms for a survival of causes of action for personal injury. Statutes which have been construed to the contrary, as we have seen, contained some language peculiar to themselves, and are not plain and direct in their terms as is the amendatory act of congress here under consideration.

The act of 1908 conferred a right of action upon employees suffering injury, and the amendment simply provided that this right of action should survive. The amendment undertook to deal with causes of action which had accrued, and which otherwise would have been lost by the death of the employee. The amendment was passed to meet the effect of the decisions in *Fulgham* v. *Midland Valley R. R. Co.* (C. C.), 167 Fed., 660, and *Walsh* v. *New York, etc., R. R. Co.* (C. C.), 173 Fed., 494. It was not the intention of congress by this amendment to create a new cause of action, but only to preserve one heretofore conferred upon the employees by the act of 1908. The act of 1908 cannot be construed as having conferred upon an employee or his estate an action for recovery of damages, where his death was instantaneous. In such cases, the right of action was conferred upon designated beneficiaries.

Only the quick can be described as *suffering*. The dead may have *suffered*, but are not *suffering*. When injury and death of an employee are simultaneous, there occurs no period in which he may be said to be *suffering*, no span of life in which this right of action may accrue. Never having existed, such right of course cannot survive.

It is insisted, however, that the reports of the judiciary committees of the house and senate indicate that the purpose of the amendment of 1910 was to make the remedy of the employee as broad and comprehensive as the remedy afforded to him and his estate in any of the States. Such language is found in these reports.

We must, however, look primarily to the language used by the lawmakers in the statute enacted. If the language there used is plain, and there is no cause for construction or interpretation, we are not justified in drawing upon extraneous sources for the meaning of the statute. The supreme court of the United States has said this:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the

cases are few and exceptional, and only arise where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute." *U. S.* v. *Goldenberg,* 168 U. S., 95, 18 Sup. Ct., 3, 42 L. Ed., 394. See, also, Lewis Sutherland Statutory Construction, sec. 366.

As said before, the language of the act of 1908 and the amendment of 1910 seems plain and simple. We cannot supply the omission of congress, nor cure a failure to adopt all the unusual remedies and measures of damage obtaining in different States, by interpolations into this act or construction broader than the language used would warrant.

As we have observed, the amendment of 1910 deals with an action that has accrued. No action accrues to an employee where his death is instantaneous, and consequently no action survives. The remedy in such cases is conferred by that portion of the original act patterned after Lord Campbell's Act, which provides for recovery in case of death in favor of certain designated beneficiaries.

The case under consideration is not covered by the amendment, and must therefore be disposed of as a suit based on the act of 1908, brought on behalf of beneficiaries named to recover damages for the employe's death.

This portion of the act of 1908 has been considered and construed by the supreme court in the late cases of *Michigan Central R. Co.* v. *Vreeland*, 227 U. S., 59, 33 Sup. Ct., 192, 57 L. Ed., 417, decided January 20, 1913, and *American R. Co.* v. *Didrickson*, 227 U. S., 145, 33 Sup. Ct., 224, 57 L. Ed., 456, decided January 27, 1913.

The court said that the act of congress, in giving an action for the benefit of certain members of the family of the decedent, was essentially identical with the act known as Lord Campbell's Act, chapter 93, 9 and 10, Victoria. Acts fashioned after Lord Campbell's Act have been passed in many States of the Union, and the rules for ascertaining and fixing damages recoverable thereunder are well settled.

Mr. Tiffany collates the statutes in his work on Death by Wrongful Act, sec. 129, *et seq.* He says:

"The distinguishing feature of Lord Campbell's Act and of acts similar to it in respect to damages is that the damages to be recovered are solely such as result (1) from the death (2) to the persons for whose benefit the action is given. This feature is common to all the acts in force in the United States with the following exceptions:

"I. The acts of Iowa, Kentucky, Oregon, and Rhode Island, as construed by the courts, provide that the damages except in actions by parents shall be such as result from the death to the estate.

"II. The acts of North Carolina, Virginia, and West Virginia, as construed by the courts, provide for a re-

covery notwithstanding there may be in existence no one of the relatives for whose benefit the action is primarily given.

"III. The acts of Louisiana, Mississippi, and Tennessee provide, in effect, for the recovery both of such damages as result to the party injured from the injury, and to the beneficiaries from the death.

"IV. The act of Georgia provides that the measure of damages shall be the full value of the life without deduction for the expenses of deceased had he lived.

"V. The acts of Massachusetts provide for a forfeiture in certain cases to be recovered by indictment. A civil action may also be maintained, under certain circumstances, in which the damages are assessed with reference to the degree of culpability of the defendant." Id., sec. 129.

The act of congress contains none of the exceptional provisions found in the statutes of some of the States noted above, but as said by the Supreme Court:

"First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as follow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injury. The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived.

Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings." *Michigan Central R. Co.* v. *Vreeland*, supra.

The court again says:

"The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, 'according as the action is brought for the benefit of husband, wife, minor child or parent of minor child for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.'" Tiffany's Death by Wrongful Act (2 Ed.), secs. 158, 160-2.

The deceased, Robert Shewalter, was an adult about twenty-five years of age. He did not live with his father at the time of his death, nor did he contribute anything to the support of his father, so far as the record shows. An effort was made by counsel for the railroad company below to ascertain from a brother of deceased while on the stand what contributions deceased had made to his father's support, with a view of putting this in evidence to mitigate the recovery. Objection, however, was taken to this evidence by counsel for plaintiff below, and it was excluded. So there is no evidence in the record that the father of deceased had been in the habit of receiving pecuniary assistance or support from deceased. The deceased was, of course, under no legal liability to the bene-

ficiary, and the beneficiary has wholly failed to show that he has lost any prospective pecuniary benefit by reason of the death of his son.

In *Michigan Central Railroad Co.* v. *Vreeland,* supra, the supreme court expressly approves the rule for the measurement of damages laid down by Mr. Tiffany in his Death by Wrongful Act. In discussing the measure of damages to which a beneficiary is entitled under Lord Campbell's Act, where the latter has no claim upon deceased, and the loss consists only in a prospective benefit to which he was not legally entitled, as where the beneficiary sues for the death of an adult child, this author says:

"The distinction taken in the English cases has generally been observed in the United States, that is, the plaintiff must show that the decedent gave assistance to the parent, or that the parent had reasonable expectation of pecuniary benefit from the continued life of the child. The proper measure of damages is the present worth of the amount which it is reasonably probable the deceased would have contributed to the support of the parent during the latter's expectancy of life in proportion to the amount he was contributing at the time of his death, not exceeding his expectancy of life; though it would seem that the rule is not to be applied with mathematical strictness, and that the jury may properly take into consideration the increasing wants of the parents, and the increasing ability of the child to supply them. In some cases the evidence has been held sufficient to sustain a finding that there

was a reasonable expectation of pecuniary benefit, although the evidence fell short of showing that assistance was actually rendered. In *Hutchins* v. *St. Paul M. & M. Ry. Co.* [44 Minn., 5, 46 N. W., 79], it was said 'the proper estimate can usually be arrived at with approximate accuracy by taking into account the calling of deceased and the income derived thereby, his health, age, talents, habits of industry, his success in life in the past, as well as the amount of aid in money or services which he was accustomed to furnish the next of kin, and if the verdict is greatly in excess of this sum thus arrived at, the court will set it aside, or cut it down.'" Tiffany's Death by Wrongful Act (2 Ed.), sec. 168.

It is necessary under the rule laid down by the supreme court, in order to entitle the beneficiaries to recover, that he show some reasonable expectation of pecuniary assistance or support of which he has been deprived, and the court held in *Michigan Central Railroad Co.* v. *Vreeland,* supra, that it was error to permit the jury to estimate the value of a husband's care and advice to his wife, even if such care and advice be considered a kind of service from him capable of measurement by pecuniary standard, where there was neither allegation nor evidence of such loss of service, care or advice.

Under the rule laid down in the several cases collected in Tiffany's Death by Wrongful Act (2 Ed.), sec. 184, it is doubtful if there is any sufficient pleading by the plaintiff below to justify a recovery in this

case. No damages to the beneficiary of this suit of a pecuniary nature are averred in the declaration. Whether such an averment was necessary or not, we need not determine. Certain it is there is no proof offered from which it appears that the plaintiff below had any reasonable expectation of pecuniary assistance or support from the deceased. As we understand *Michigan Central R. Co.* v. *Vreeland,* supra, such proof is necessary to a recovery.

There being therefore, no evidence upon which a recovery in this case might be based, the motion of the railroad company for peremptory instructions should have been sustained. The action of the lower courts in overruling such motion is here reversed, and the suit dismissed.

KING *v.* SULLIVAN COUNTY *et al.*

(*Knoxville.* September Term, 1913.)

1. **TAXATION. Statutory provisions. Equality and uniformity.**

Acts 1909, ch. 169, and Acts 1911, ch. 620, authorizing the county to issue bonds to build roads and to levy and collect taxes on all property in the county, including that within the corporate limits of any municipality, to pay the interest, and to create a sinking fund for the payment of the principal thereof, do not violate Const., art. 2, sec. 28, requiring all property to be taxed according to its value so that taxes shall be equal and uniform throughout the State, although municipalities within such county are also required to levy and collect taxes for the maintenance of their streets, in view of section 29, empowering the general assembly to authorize counties and incorporated towns to impose taxes for county and corporation purposes, and providing that all property shall be taxed according to its value upon the principles established in regard to State taxation, since the purpose of the tax is a proper county purpose, and property within a municipality within the county is therefore liable therefor. (*Post*, *p.* 395.)

Acts cited and construed: Acts 1911, ch. 620; Acts 1909, ch. 169; Acts 1907, ch. 370.

Constitution cited and construed: Sec. 28, art. 2.

Cases cited and approved: L. & N. R. R. v. County Court of Davidson County, 33 Tenn., 637; Nichol v. Nashville, 28 Tenn., 268; Adams v. M. & L. R. O. Co., 42 Tenn., 656; McCallie v. Chattanooga, 40 Tenn., 322: Shelby County v. Exposition Co., 96 Tenn., 658; Edmondson v. Board of Education, 108 Tenn., 558.

2. **TAXATION. Statutory provisions. Equality and uniformity. "Uniform taxation."**

Under Const., art. 2, sec. 28, providing that taxes shall be equal and uniform throughout the State, the uniformity required is limited to a uniformity in rate, assessment, and valuation of

the particular tax involved, and has no reference to a uniformity of the sum total of taxes which a citizen is required to pay. (*Post*, *p.* 397.)

FROM SULLIVAN.

Appeal from Chancery Court, Sullivan County.—WILL D. WRIGHT, Chancellor, sitting by interchange with HAL H. HAYNES.

HARR & BURROW, for appellant.

POWELL, PRICE & SHELTON and ST. JOHN & GORE, for appellees.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

The complainant filed this bill as a citizen and taxpayer of Sullivan county to enjoin an issue of bonds by that county for the purpose of building pike roads in the county outside the corporate limits of the city of Britsol.

The complainant is a citizen of Sullivan county residing in the city of Bristol, and is a taxpayer to both the county and city. Chapter 620 of the Acts of 1911, and chapter 169, Acts of 1909, authorize the county of Sullivan to issue coupon bonds to build pike roads, and to levy and collect taxes on all property in the county "including that within the corporate limits of any

municipality," to pay the interest, and to create a sinking fund to pay the principal of the bonds.

The question made against the validity of the act is that a levy of taxes on property in the city of Bristol to build and keep up streets and roads inside the corporate limits as is required by the charter of the city, and a levy of taxes upon property located within the city to build pike roads in the county and outside the city limits, is unequal and unjust taxation, and is not uniform, and is in violation of section 28 of article 2 of the State Constitution. It is said that this is so because property located outside of the city limits is not taxed to build roads and streets within the city. It is also said that the State requires the city of Bristol to levy and collect taxes for the purpose of maintaining its streets, and by this act permits the county to levy and collect taxes on the same property to build pike roads outside the city limits.

Section 28 of article 2 of the constitution, requiring that "all property shall be taxed according to its value, . . . so that taxes shall be equal and uniform throughout the State," must be construed in respect of the acts in controversy in connection with section 29 of the same article, which is as follows:

"The general assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed accord-

ing to its value, upon the principles established in regard to State taxation."

It was determined by this court in *Malone* v. *Taylor*, decided at the April term, 1908, that the taxation of property within the corporate limits of the city of Memphis to build public roads outside the city and within the county of Shelby is not a contravention of section 8 of article 1 of the constitution.

The tax authorized by chapter 370 of the Acts of 1907, the validity of which was involved in that case, was identical with the tax authorized by the statutes brought in controversy here, and the court held that such a tax "is clearly for a public county purpose, and leviable on all the property situated within the county, although —its expenditure is limited to the improvement of public roads outside the city of Memphis. We think this principle is well settled by numerous adjudications of this court. *L. & N. R. R.* v. *County Court of Davidson County*, 1 Sneed, 637 [62 Am. Dec., 424]; *Nichol* v. *Nashville*, 9 Humph., 268; *Adams* v. *M. & L. R. O. Co.*, 2 Cold., 656; *McCallie* v. *Chattanooga*, 3 Head, 322; *Shelby County* v. *Exposition Co.*, 96 Tenn., 658 [36 S. W., 694, 33 L. R. A., 717]; *Edmondson* v. *Board of Education*, 108 Tenn., 558 [69 S. W., 274, 58 L. R. A., 170.] The foregoing authorities also establish the proposition that the road tax in question is not only a county purpose, but it is also a municipal purpose."

The uniformity required by section 28 of article 2 is limited to uniformity in rate, assessment, and valua-

tion of the particular tax involved. It has no reference to a uniformity of the sum total of taxes which a citzen is required to pay; that is, it does not require that the total taxes assessed against property situated in a municipality shall not exceed the sum total of taxes assessed against property located outside of a municipality. It does require that there shall be uniformity of valuation and assessment of property for purposes of taxation, and that the tax levy for any given purpose shall be uniform throughout the territory to which it is applied.

In this particular case, it would not be competent to authorize a levy of taxes on property inside the city of Bristol at a rate of taxation more or less than the same levy upon property outside the corporation.

It being established that the tax is levied for a proper county purpose, and the complainant's property being located within the county, he is liable for the tax. If this were not so, the school system, the bridges across the waters of the State, the through roads in the various sections of the State maintained and built, each of them, by general levy of taxation, would have to fall because similar taxes are levied in the various municipalities. The extra taxation which a citizen of an incorporated town must pay is to support his municipal government. It has no relation to the duty he owes to contribute to the support of the State and county governments which afford him and his property equal protection with every other citizen, whether they reside within the municipality or not. It is an

extra burden which the citizen of a municipality bears for the benefit he derives from the municipal government. The right of free locomotion is fully preserved by our constitution, and as no citizen is required to reside or own property within a municipality, and as there is plenty of room on the outside, it would seem that the burden complained of is optional with the citizen to be borne or cast off as he may choose.

The decree of the chancellor dismissing the bill is affirmed.

CITY OF CHATTANOOGA *v.* SOUTHERN RAILWAY CO.

(*Knoxville.* September Term, 1913.)

1. **RAILROADS. Street crossings. Police power.**

Acts 1907, ch. 149, sec. 25, empowering a city to require, by ordinances, railroad companies to build, maintain, repair, or replace at their own expense such bridges and approaches over their tracks when crossing any streets as the council may deem necessary to the safety and convenience of travelers on the street, and an ordinance pursuant thereto are within the scope, and an exercise, of the police power. (*Post*, *p.* 401.)

Acts cited and construed: Acts 1907, ch. 149, sec. 25.

2. **CONSTITUTIONAL LAW. Impairing obligation of contracts.**

The matter of proper crossings of streets and railroads for the safety and welfare of the public is one within the police power, future exercise of which cannot be bargained away by a city, so that Const. U. S., art. 1, sec. 10, forbidding passage of laws impairing obligation of contracts, is not contravened by Acts 1907, ch. 149, sec. 25, empowering a city, by ordinance, to require a railroad to build or replace, bridges over its tracks at street crossings, and an ordinance requiring the company to build a new bridge at such a crossing, though prior to the act, in consideration of contribution by the company to a bridge there built, the city contracted with it to forever after maintain a suitable bridge there. (*Post*, *p.* 402.)

Cases cited and approved: Chicago, etc., R. Co. v. People, 200 U. S., 561; Chicago, etc., R. Co. v. Nebraska, 170 U. S., 57; State, ex rel. Minneapolis, v. St. Paul, etc., R. Co., 98 Minn., 380; Northern Pacific R. Co. v. Minneapolis, ex rel. Duluth, 208 U. S., 583.

3. **RAILROADS. Street and railroad crossings. Power to require bridges.**

Under the common law a city could require a railroad to construct and maintain, at its expense, a proper bridge at a street crossing over its tracks. (*Post*, *p.* 408.)

Cases cited and approved: Railroad v. State, 40 Tenn., 523; Dyer County v. Railway, 87 Tenn., 712; Railway v. State, 87 Tenn., 751.

FROM HAMILTON.

Appeal from Chancery Court, Hamilton County.—T. M. McConnell, Chancellor.

Bachman & Noll and Coleman & Frierson, for City of Chattanooga.

Cooke, Swaney & Hope, for Southern Railway Co.

Mr. Justice Williams delivered the opinion of the Court.

This suit, standing on bill of complaint of the city and cross bill of the railway company, was brought to determine whether the city or the company is liable for the cost of constructing a bridge over the track of the company on one of the streets of the city. The bridge, being deemed by both parties an urgent necessity, was constructed at a cost of $8,354.90, under an agreement that provided that each party should contribute one-half of the cost, and that neither should be precluded of its right later to recover of the other. The city sues for $4,177.45, and the company by its cross bill sues the city for a like sum.

The city predicates its right to recover on an ordinance duly passed pursuant to power conferred on it

by an act of the legislature (Acts 1907, ch. 149, sec. 25) "to require, by ordinance, railroad companies to build, maintain, repair, or replace, at their own expense, such bridges and approaches, . . . over their tracks when the same cross any of the streets of said city, as the general council may deem necessary to the safety and convenience of the public traveling on said streets," etc.

The bridge in question replaced an old wooden structure which had been erected in 1876, and, concededly, had become inadequate.

The company's defense, and also its right to recover under its cross bill, is, in the ultimate, based on a contract in reference to the construction of the old bridge; it being alleged that in 1876 its predecessor company had contributed $1,000 towards such construction under a contract, duly entered into, which provided that for that consideration the city should build and forever afterwards maintain a bridge at the crossing in question, sufficient and suitable to accommodate the travel at that and all future times. It is contended by the company that this contract was validly entered into, and that it cannot be affected by the statute and the pursuant ordinances, later passed, because of the provision of the constitution of the United States (article 1, sec. 10) forbidding the passage of laws impairing the obligation of contracts.

It is clear that the statute and ordinance touching such bridge were within the scope, and an exercise, of the police power of the State. Authorities subsequent.

But the company's contention is that, while this may be true generally, yet that the extension of the police power of the city by the legislative act could not operate to nullify the contract previously made, especially since the city does not purpose a change in the character of the crossing from an overhead structure to one not overhead.

The insistence of the city is that it was beyond the power of the board of mayor and aldermen of Chattanooga, in 1876, to so bargain or contract as to deprive future boards of the exercise of police power in relation to this subject-matter, thereafter conferred on the municipality by the State.

No court has gone further than the supreme court of the United States in giving to the police power a broad scope and application. *Chicago, etc., R. Co.* v. *People,* 200 U. S., 561, 26 Sup. Ct., 341, 50 L. Ed., 596, 4 Ann. Cas., 1175.

Recent decisions by that court appear to us to have construed the provision of the national constitution invoked by the company—forbidding the impairment of the obligation of contracts—in connection with the police power, in such way as to demonstrate the unsoundness of the company's contention.

In *Chicago, etc., R. Co.* v. *Nebraska,* 170 U. S., 57, 18 Sup. Ct., 513, 42 L. Ed., 948, it was held that contracts which affect the safety and welfare of the public are within the supervising power and control of the legislature when exercised under the police power to protect the public safety, and that the obligation of a con-

tract between a city and a railroad company to participate, in view of their mutual duty to the public, in the construction of a viaduct over the company's tracks is not violated or impaired by a statute and ordinance, later passed, compelling the railroad alone to repair it. The court, speaking first in respect of the contract to participate in the construction of the viaduct, said:

"No doubt the agreement of 1886 constituted a contract in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted, its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation?

"Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other, and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within

the supervising power and control of the legislature when exercised to protect the public safely, health, and morals, and that clause of the federal constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature.

"We do not, indeed, understand that these principles are questioned on behalf of the plaintiff in error. What is claimed is that the subject-matter of the contract in question does not fall within the range of the police power of the State; . . . that, while it is not questioned that the maintenance of the viaduct is essential to the safety of the community, yet, if existing contract obligations devolve this burden upon the city, the legislature of the State cannot, under the plea of public necessity, pass a law imposing it upon the plaintiff in error, without bringing the act within the prohibitions of the federal constitution."

Continuing the discussion on the point pressed on us in the case in hand, the court said:

"In view of the paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control, and change such agreements as may be from time to time entered into between the city and the railroad company in respect to

such crossing, saving any rights previously vested. Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature."

In *State, ex rel., Minneapolis* v. *St. Paul, etc., R. Co.*, 98 Minn., 380, 108 N. W., 261, 28 L. R. A. (N. S.), 298, 120 Am. St. Rep., 581, 8 Ann. Cas., 1047, there was involved a contract, entered into in 1892, by which the city of Minneapolis, in consideration of the railroad company constructing certain bridges and approaches at the intersection of stipulated streets, expressly agreed that the city would thereafter construct and maintain all crossings or approaches made necessary by the opening of new streets. It was contended by the railroad company that this constituted a valid contract with the city, and, having been complied with on the part of the company, that it was beyond the power of the city later to require the company to construct the bridge over a new street, in question; that to so require would be to impair the obligation of the contract. The court said:

"In this we do not concur. The power of the State to require the defendants to construct the bridge in question, or any other bridge at streets crossing the right of way is an exercise of the police power, which can be neither contracted away nor lost by inaction on the part of the public authorities. The contract was

beyond the authority of the city council, and *ultra vires*, and void''—citing *Chicago, etc., R. Co.* v. *Nebraska*, supra.

This Minnesota case was, by writ of error, taken to the supreme court of the United States, where it was affirmed (214 U. S., 497, 29 Sup. Ct., 698, 53 L. Ed., 1060), on the authority of the case of *Northern Pacific R. Co.* v. *Minnesota, ex rel., Duluth*, 208 U. S., 583, 28 Sup. Ct., 341, 52 L. Ed., 630.

This last-named case was a companion case to the Minneapolis case, and in it the opinion of the Minnesota court in the Minneapolis case was freely and approvingly quoted by the supreme court of the United States. Referring to rulings of the supreme court of Minnesota to the effect that it lay in the power of the city, at common law, at the time the contract was made with the company, to have required the latter to maintain in safety its crossings with both existing and future streets, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy, and void, the court said, through Mr. Justice Day:

''This doctrine is entirely consistent with the principles decided by this court. But it is alleged that at the time this contract was made with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of the police power cannot be limited by contract for reasons of public policy, nor

can it be destroyed by compromise, and it is immaterial upon what consideration the contract rests, it is beyond the authority of the State or the municipality to abrogate this power so necessary to the public safety." *Northern Pacific R. Co.* v. *Minnesota, ex rel., Duluth,* supra.

It was there again specifically ruled that the defense here urged of impairment of the obligation of a contract was not maintainable. The court well said that the police power is a continuing one, and that a requirement imposed on the company under it was "not in violation of the constitutional inhibition against the impairment of the obligation of contracts."

We are unable to distinguish the case at bar, in principle, from the Minneapolis case; and on its facts it is a counterpart of the Duluth case, where the contract was one under which the city and company shared the construction cost of an overhead bridge, and the city agreed that it would thereafter forever maintain and keep in repair the approaches thereto, and, for a period of fifteen years, the structure proper. Within the fifteen years the city demanded of the company that it repair the structure, and the litigation and rulings related thereto. 98 Minn., 429, 108 N. W., 269.

A fundamental contention of the company in this case is that in 1876 the duty of constructing and maintaining the old bridge was devolved by law on the city, and that the city had not power in law to compel the company to erect or maintain the bridge then constructed. If it be conceded that at that date there was

no statutory power in the city to that end, did it exist at the common law? This question is also discussed at length in the cases supra, decided by the supreme courts of Minnesota and the United States, where it was held that, by the great weight of authority, the city could enforce the construction and maintenance of such a structure as an obligation imposed on the company by the common law.

In this State as early as 1859 it was held, in *Railroad* v. *State,* 3 Head, 523, 75 Am. Dec., 778, that it was the duty of such a company to construct a suitable crossing, a bridge if necessary, "under the general principles of the common law." Our later case of *Dyer County* v. *Railway,* 87 Tenn., 712, 11 S. W., 943, is in accord, and further holds that the company's duty was a continuing one as to repair, and that case was cited by the supreme court of Minnesota in the Minneapolis case in support of its own holding. See, also, *Railway* v. *State,* 87 Tenn., 751, 11 S. W., 946.

It is clear that, if that right was then by the city deemed doubtful, and that, under doubt as to where to lay the paramount duty to construct and maintain the bridge, the contract was then entered into, in *quasi* compromise or truce, a later valid exercise of the police power did not work an impairment that was a violation of the constitutional provision invoked.

If it be conceived that the contract of 1876 was valid to an extent, still the contracting parties were charged with notice of the limitation of power on the part of the city in respect of its binding itself not to exercise in

after years a police power to onerate the company with the constructon and maintenance of a safer and more adequate bridge, demanded by changed conditions, mainly incident to the growth of the city.

The chancellor was not in error in so ruling; decree below affirmed, and the cause remanded for further proceedings in accord.

BAIRD *v.* SMITH.*

(*Knoxville.* September Term, 1913.)

CONTRACTS. Lessening competition. Sale of business.

The provision of a contract, by which one sells his stock of goods and the fixtures of his store, that he will not in that town for five years engage in business in competition with the buyer, does not "tend to lessen free and full competition" in the sale of articles that had become a part of the mass of the property in the State, in violation of Acts 1903, ch. 140, sec. 1; the meaning of "competition," or of undue or unreasonable restraint of trade, under the common law, not being changed by the statute. (*Post*, *pp.* 413, 414.)

Cases cited and approved: U. S. v. American Tobacco Co., 221 U. S., 171, 174; Jackson v. Byrnes, 103 Tenn., 698; Bradford v. Furniture Co., 115 Tenn., 610; Turner v. Abbott, 116 Tenn., 725; Smith v. Webb (Ala.), 58 South., 913; State v. Witherspoon, 115 Tenn., 138; State, ex rel., v. Woolen Mills, 115 Tenn., 267; Standard Oil Co. v. State, 117 Tenn., 642; Standard Oil Co. v. Tenn., 217 U. S., 413

FROM CAMPBELL.

Appeal from Chancery Court, Campbell County.—HUGH G. KYLE, Chancellor.

H. K. TRAMMELL, for appellant.

*As to the validity of an agreement in restraint of trade or profession as affected by its territorial scope, see note in 24 L. R. A. (N. S.), 913. And on the question of the validity of contracts in restraint of trade without limitation of place, see note in 22 L. R. A., 673.

JOHN JENNINGS, JR., for appellee.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

On May 9, 1910, the parties above named entered into a written contract whereby Smith sold to Baird the entire stock of merchandise and fixtures located in a certain storehouse in Jellico, Tenn., known as the "Racket Store." The contract contains the terms of sale (which are not material to be set out here), and then proceeds as follows:

"Further considerations of this agreement are as follows:

"The said W. G. Smith binds himself in the sum of one thousand dollars ($1,000), to be paid to the said M. E. Baird, due only under the following conditions: Should the said W. G. Smith enter into any business other than the business which he is now connected with, viz., the Smith Shoe & Clothing Company, in the town of Jellico, for a period of five (5) years, in any line of merchandise that would be considered in competition to the store sold to M. E. Baird, then the said W. G. Smith agrees to pay one thousand dollars ($1,000) to said M. E. Baird for this privilege."

The contract was in duplicate, executed in the presence of two witnesses, and signed by the respective parties. Baird paid the consideration money, entered into possession of the stock and fixtures and since the date of the contract has been doing business at the "Racket Store." On November 25, 1912, he brought

this suit, seeking a decree against Smith for $1,000 and interest upon an alleged breach of the above-quoted portion of the contract.

The chancellor decreed as prayed in the bill, and Smith appealed, and has assigned errors in this court.

It is the opinion of the majority of the court (in which the writer, however, does not concur) that the contract was breached by Smith, and that so far as this branch of the case is concerned there was no error in the decree. This branch of the case has been disposed of in an oral opinion and need not be further noticed.

The next and only remaining question arises upon Smith's insistence that the chancellor should have held the clause quoted from the contract void, because it was a contract tending to lessen full and free competition in the sale of merchandise, within the meaning of chapter 140, Acts of 1903. It is urged that the lessening or restraint of competition need not, under the act, be unreasonable, as it must have been at common law, in order to invalidate the contract, but, on the contrary, under the act a mere tendency to lessen full and free competition invalidates the contract.

An analysis of section 1 of the act in question reveals a twofold purpose in the passage of that section.

The first was to preserve full and free competition in the sale of articles of merchandise which had become a part of the mass of property in the State.

The second was to preserve full and free competition in the sale and manufacture of articles of domestic

growth and domestic raw material, and to prevent all combinations tending to affect the price or cost thereof to the consumer or producer.

With the second of these purposes we are not concerned in the present case. It is the first purpose of the act, and how far, if at all, it has changed the rules of the common law with respect to contracts of this character, that we must consider in the present case.

We think the only change in the common law the statute has wrought is accomplished by the use of the words "tend to" in the first section of the act. The test at the common law had been whether, in point of fact, the contract or other matter in question did in fact work an undue or unreasonable restraint upon full and free competition; the test under the statute is whether it "tends to" do so. The statute works no change in the meaning of the word "competition" as it was understood at common law, nor does it change what was at common law undue or unreasonable restraint of trade, or such restraint of the synonymous term, "full and free competition."

So the question before us narrows down to the point of determining whether the contract in suit, or that part of it quoted herein, tended within the meaning of the first section of the act to lessen full and free competition, and therefore contravened the public policy underlying the act.

Under the common law in force in this State prior to any legislation on the subject, only such combinations, contracts, or agreements as operated to the prej-

udice of the public interest by unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the act, injuriously restricted trade, were denounced as void on grounds of public policy.

Such was the holding of the supreme court of the United States in *U. S.* v. *American Tobacco Co.*, 221 U. S., 171, 174, 31 Sup. Ct., 632, 55 L. Ed., 693, 694, where it was said that the statute under consideration there should be so interpreted as not to restrain the power to make "normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose." And so we think the act in question in the present case must be read and interpreted. Every contract by which one person secures to himself the ownership, dominion over, and right to fix a price on or sell, or to keep for his use, a particular portion of the common mass of merchandise in the State, is to that extent an exclusion of the like rights in all others over that property during his ownership, and such person, if under no public duty or contract to part with the merchandise, may keep and use it, or sell it at such price as he sees fit. He is free to do as he likes in respect to it; and so was the vendor from whom he acquired title, if similarly circumstanced.

And, as we see the present case, Smith, who had gathered into his "Racket Store" a part of the common mass of merchandise in the State, and who by sale of merchandise of like character in that place had built

up a good name or good will for his business in that particular class of merchandise, had a property right, not only in the merchandise and fixtures sold to Baird, but also in the good will or name of the business. The contract between Smith and Baird does not expressly convey the good will of the business; but, notwithstanding this fact, we think Smith's right was clear to sell the stock of merchandise and fixtures, and as an incident of his ownership of the stock and the business conducted by him, and as an element entering into and forming a part of the value thereof, to bind himself not to engage in business in competition with Baird in the town of Jellico for the period of time named in the contract. *Jackson* v. *Byrnes,* 103 Tenn., 698, 54 S. W., 984; *Bradford* v. *Furniture Co.,* 115 Tenn., 610, 92 S. W., 1104, 9 L. R. A. (N. S.), 979; *Turner* v. *Abbott,* 116 Tenn., 725, 94 S. W., 64, 6 L. R. A. (N. S.), 892, 8 Ann. Cas., 150; *Smith* v. *Webb* (Ala.), 58 South., 913, 40 L. R. A. (N. S.), 1192.

We do not think the contract tended to restrain full and free competition within the meaning of the act of 1903. Our case of *Turner* v. *Abbott,* supra, is controlling authority in the present case.

The act of 1903, upon other phases than that involved in the present case has been considered by this court in *State* v. *Witherspoon,* 115 Tenn., 138, 90 S. W., 852. *State, ex rel.,* v. *Woolen Mills,* 115 Tenn., 267, 89 S. W., 741, 2 L. R. A. (N. S.), 493, 112 Am. St. Rep., 825; *Standard Oil Co.* v. *State,* 117 Tenn., 642, 100 S. W., 705, 10 L. R. A. (N. S.), 1015; *State, ex rel.,* v.

Standard Oil Co., 120 Tenn., 138, 110 S. W., 565. And the act is considered by the supreme court of the United States in *Standard Oil Co.* v. *Tenn.*, 217 U. S., 413, 30 Sup. Ct., 543, 54 L. Ed., 817.

It results, from the views expressed, that the decree of the chancellor must be affirmed, with costs.

INTERSTATE AMUSEMENT CO. *v.* ALBERT *et al.**

(*Knoxville.* September Term, 1913.)

1. **COMMERCE. Interstate commerce.**

"Commerce" among the States consists of intercourse and traffic, including the transportation of persons and property as well as the purchase and exchange of commodities. (*Post*, *p.* 423.)

Acts cited and construed: Acts 1877, ch. 31; Acts 1891, ch. 122; Acts 1895, ch. 81.

Cases cited and approved: Railroad v. Harris, 99 Tenn., 684; Brennan v. City of Titusville, 153 U. S., 289; Milan Milling Co. v. Gorten, 93 Tenn., 590; Mobile County v. Kimball, 102 U. S., 702; Williams v. Fears, 179 U. S., 270.

2. **COMMERCE. Interstate commerce.**

Complainant operated a theatrical "circuit" by contracting as agent for the owners of various theaters to furnish theatrical talent in consideration of $10 a week for certain weeks in the year, and of five per cent. of the amount paid by the owners to each troupe of actors furnished by complainant; complainant's contract with the owner stipulating against liability for failure of any actors to fulfill their contracts or for delay in arriving at the particular city. *Held*, that such a contract, made by complainant, whose general offices were in Chicago, with defendant, to furnish various troupes of actors for playing in defendant's opera house in Chattanooga, Tenn., did not involve interstate

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*On the question whether soliciting trade constitutes doing business within the State, see notes in 9 L. R. A. (N. S.), 1214 and 23 L. R. A. (N. S.), 834.

The question of the right of a foreign corporation to sue is treated in a note in 24 L. R. A., 289. And upon the right of a foreign corporation which has not complied with local laws to defend action, see note in 17 L. R. A. (N. S.), 1117.

commerce, so that complainant was subject to Tennessee laws in executing such contract. (*Post*, *p.* 425.)

Case cited and construed: Hooper v. California, 155 U. S., 648.

3. CORPORATIONS. Foreign corporations. "Doing business" within the State.

Complainant, a foreign corporation, which maintained general offices in Chicago, Ill., was engaged in booking actors to play in various theaters, and received for its services a certain sum from the theater owner and a commission retained by him out of the actors' salaries and paid over to complainant. For the purpose of enlarging its business, complainant sent agents into Tennessee, and made such contracts from time to time with the owners of various theaters besides defendant, and had had much correspondence with the owners of various theaters in the State. The contract with defendant for furnishing theatrical troupes was finally signed and accepted by defendant in Tennessee. *Held*, that complainant was "doing business" within the State, within Acts 1877, ch. 31, Acts 1891, ch. 122, and Acts 1895, ch. 81, prohibiting foreign corporations not complying with the statute from doing business in the State or maintaining any action, etc., so that complainant, not having complied with the statute, could not sue on the contract. (*Post*, *pp.* 425, 426.)

4. CORPORATIONS. Foreign corporations. Noncompliance with statutes. Effect.

A foreign corporation, which does not comply with Acts 1877, ch. 31, Acts 1891, ch. 122, and Acts 1895, ch. 81, cannot maintain an action arising out of business transacted within the State, even though the illegality of such transactions only appears from the proof, and not from the pleading. (*Post*, *p.* 427.)

Cases cited and approved: Cary-Lombard Lumber Co. v. Thomas, 92 Tenn., 587; Harris v. Water & Light Co., 108 Tenn., 245; Louisville Property Co. v. Nashville, 114 Tenn., 213; Lumber Co. v. Moore, 126 Tenn., 313; Insurance Co. v. Kennedy, 96 Tenn., 714; John Deere Plow Co. v. Wyland, 69 Kan., 255; Cone Export & Commission Co. v. Poole, 41 S. C., 70; Penn. Collieries Co. v. Edward J. McKeever, 183 N. Y., 98; A. Booth & Co. v. G. M. Weigand, 30 Utah, 135.

5. **CORPORATIONS. Foreign corporations. "Doing business."**

A foreign corporation is "doing business" within the State when it transacts therein some substantial part of its ordinary business, and its operations within the State do not consist of mere casual or occasional transactions. (*Post*, *p.* 430.)

Cases cited and approved: Chattanooga Bldg., etc., Association v. Denson, 189 U. S., 408; Lumberman's Insurance Co. v. Myer, 197 U. S., 407; Mutual Life Ins. Co. v. Spratley, 172 U. S., 602; Diamond Glue Co. v. U. S. Glue Co., 187 U. S., 611; International Text Book Co. v. Pigg, 217 U. S., 91.

FROM HAMILTON.

Appeal from Chancery Court, Hamilton County.—T. M. McConnell, Chancellor.

Joe V. Williams and Coleman & Frierson, for appellants.

W. E. Drummond and W. B. Miller, for appellee.

Mr. Justice Buchanan delivered the opinion of the Court.

The Amusement Company, when it made the contract on which this suit must stand or fall, when each item of the stated account on which it sued accrued, and when it brought this suit, and at the trial thereof, was a foreign corporation guilty of noncompliance with our statutes in respect of "all corporations chartered or organized under the laws of other States or countries for any purpose whatsoever which may desire to do

any kind of business in this State." The statutes above referred to are chapter 31, Acts 1877, chapter 122, Acts 1891, and chapter 81, Acts 1895.

And so, by way of defense to this suit, W. S. Albert, one of the defendants, set up the above facts in bar of the right of the Amusement Company to maintain this suit. He also made the defense of set-off, which is not sustained by the proof, and will not be further noticed.

By article 1, section 8, of the Constitution of the United States, one of the powers conferred upon congress is "to regulate commerce with foreign nations, and among the several States, and among the Indian tribes." This grant of power to congress has been held by implication to exclude the several States from the exercise of such powers except by consent of congress. *Railroad* v. *Harris,* 99 Tenn., 684, 43 S. W., 115, 53 L. R. A., 921, and authorities there cited.

In *Brennan* v. *City of Titusville,* 153 U. S., 289, 14 Sup. Ct., 829, 38 L. Ed., 719, Mr. Justice BREWER, in the opinion of the court, said: "It must be considered, in view of the long line of decisions, that it is well settled that nothing that is a direct burden upon interstate commerce can be imposed by the State without the consent of congress, and that silence of congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

It is first insisted for the Amusement Company that the business out of which the account arose under the

contract was commerce between different states, and therefore that our statutes referred to above have no application to, or effect upon, the contract, the account, the business done under the contract, nor upon the right of the Amusement Company to recover in this suit. This insistence, if sound, would result in our affirmance of the decree of the chancellor for $1,693.86 in favor of the Amusement Company. To sustain the above insistence *Milan Milling Co.* v. *Gorten,* 93 Tenn., 590, 27 S. W., 971, 26 L. R. A., 135, is cited. We approve that case.

But can the first insistence of the Amusement Compan be sustained under the facts of the present case? To answer this question requires a brief review of the facts.

The Interstate Amusement Company brought this suit by original bill in the chancery court of Hamilton county on February 5, 1913, against W. S. Albert, Fletch Catron, and the Tennessee Realty & Leasing Company, a corporation under the laws of Tennessee.

The bill shows that the complainant is a corporation with its *situs* in Chicago, and that each and all of the defendants are domiciled in the county and State where the suit is brought.

That defendants Fletch Catron and W. S. Albert were formerly partners doing business under the firm name of Catron & Albert, and as such firm became indebted to the Interstate Amusement Company in the sum of $1,554, as shown by a statement of account cer-

tified to be correct by signature of the name of Catron & Albert, by W. S. Albert.

The corporate defendant was shown to have in its hands a certain sum of money more than sufficient to satisfy complainant's demand, and it was the purpose of the bill to impound that fund for the satisfaction of the decree prayed for against the other defendants. Before the suit was brought, Catron had become bankrupt, and, while he answered, made practically no defense to the suit. The corporate defendant made the usual answer of a mere stakeholder without other interest in the suit, and W. S. Albert set up the two defenses to which we have heretofore referred. The complainant relied on its account stated, and took no proof, and all of that which appears in the record was on behalf of the defendant Albert.

From the record, it is clear that, while the bill makes no reference to the existence of any written contract as the basis of the account stated exhibited with it, yet there was a written contract between the complainant and the firm of Catron & Albert, which was in fact the basis of that account.

It is clear from an examination of the contract that it created merely the relationship of principal and agent between the parties. By it the complainant became the agent of Catron & Albert, bound to render them the personal services called for by the contract in consideration of $10 per week for certain weeks in each year, and the further sum of five per cent of the amount paid by Catron & Albert to each troupe of

actors in each play furnished to the principal by the services of the agent; and the consideration for which the agent rendered its services was to forward it by the principal on Monday of each week from Chattanooga, Tenn., to Chicago, Ill., where the office of the agent was located.

"Commerce with foreign nations and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." *Mobile County* v. *Kimball*, 102 U. S., 702, 26 L. Ed., 241.

The same court, in a case very much in point here, held that agents engaged in hiring laborers in the State of Georgia to be employed beyond the limits of that State were not engaged in interstate commerce, and while it was admitted *arguendo* in the opinion in that case that transportation interstate must necessarily take place as the result of the contracts, yet it was held not to follow that the emigrant agent was employed in transportation. *Williams* v. *Fears*, 179 U. S., 270, 21 Sup. Ct., 128, 45 L. Ed., 186.

So it is clear that, under the contract in the present case, and under the proof as it shows the execution of that contract, it was not contemplated that the complainant agent should engage, nor did it, in the execution of the contract, in fact engage, so far as this record shows, in the interstate transportation of the troupes of vaudeville actors. On the contrary, in

clause 5, the agent especially stipulates against liability or responsibility for failure on the part of any artist or artists (as the actors are called) to fulfill their contracts, and against any accident or delay which may intervene to prevent their arrival in Chattanooga when scheduled there to appear.

The true question before us, it must here be borne in mind, is whether the business between the Amusement Company and Catron & Albert, whereby the former was merely acting as go-between, middleman, or agent, involved or was interstate commerce. True it is that such commerce might or might not, so far as this record shows, become an incident or factor in the execution of the contract, which is to say that it might or might not be necessary for the actors employed by the agent to cross the State line in traveling to Chattanooga; but such interstate commerce, if it accrued as a consequence of the contract, would only be incidental to its execution, and not a part of it as between the parties to the contract. Such incidental connection of interstate commerce with the business contemplated by the principal and agent does not stamp that business with the character of interstate commerce. Speaking to the exact point, the present chief justice of the supreme court of the United States in the next case cited below called attention to this distinction, and to its observance in the authorities cited in that opinion, he said:

"If the power to regulate interstate commerce applied to all the incidents to which said commerce might

give rise and to all contracts which might be made in the course of its transaction, that power would embrace the whole sphere of mercantile activity in any way connected with trade between the States, and would exclude State control over many contracts purely domestic in their nature." *Hooper* v. *California*, 155 U. S., 648, 15 Sup. Ct., 207, 39 L. Ed., 297.

Under the facts of the case before us and the authorities above referred to, we are convinced that the contract and business out of which this suit arises was subject to the laws of Tennessee, and complainant's insistence that it was free from State control because it was interstate commerce is, we think, unsound.

The only remaining insistence for complainant is that this record does not disclose a doing by the company of business in Tennessee within the meaning of our statutes.

The contract was first signed by complainant in Chicago, but this signature did not make it a contract. It became a contract only when signed by Catron & Albert, and their signature was affixed to it in Tennessee at Chattanooga.

The amount the Amusement Company claims the right to recover from Catron & Albert in this suit is made up of two elements, as we have seen, each of which depends on, and directly grows out of, business which, in contemplation of the contract, was to be done in Tennessee. This business was the appearance of actors at the theater of Catron & Albert in Chattanooga, for the booking and employing of whom the

contract stipulated $10 per week for certain weeks should be paid to complainant, and out of the salaries of the actors five per cent. was to be withheld by Catron & Albert and paid to complainant. It is clear from this record that, for the purpose of enlarging and extending its business in Tennessee, complainant had agents who came into the State and made contracts with other owners of theaters than Catron & Albert; and it is shown by this record that Albert had much correspondence with owners of theaters looking to the extension of complainant's business. A large part of this correspondence was with persons who were residents of this State, and who were interested in theaters located here. While the complainant appears to have had no person located in this State and resident here which it admits was its agent, yet it cannot be doubted on this record that, whenever the nature of its business required the same to be done, it sent an agent to look after its business.

The seventh clause of the articles of association of the complainant states its purpose to be "to conduct and operate a general theatrical and amusement business."

This purpose if carried out, as is clearly shown in this record, by the establishment of what it called "circuits," on which were located theaters convenient each to the other, and its scheme contemplated the making of contracts with each of these theaters similar to that of Catron & Albert, and the collection of its revenues arising from booking fees and its percentages on

actors' salaries. It was distinctly a middleman, levying tribute from the owner of the house where amusement was afforded and from the actors whose talents were employed. Its operations in Tennessee were manifestly employed for the general prosecution of its ordinary business, and clearly within the prohibition of our statutes. It has been too long settled to need discussion that a foreign corporation guilty of noncompliance with these statutes can have no remedy growing out of its transactions made in violation of them; and this is true, even in a case where the illegality is made to appear by proof alone without a pleading pointing it out. *Cary, Lombard Lumber Co.* v. *Thomas,* 92 Tenn., 587, 22 S. W., 743. Also construing and applying these statutes are *Harris* v. *Water & Light Co.,* 108 Tenn., 245, 67 S. W., 811; *Louisville Property Co.* v. *Nashville,* 114 Tenn., 213, 84 S. W., 810; *Lumber Co.* v. *Moore,* 126 Tenn., 313, 148 S. W., 212; *Insurance Co.* v. *Kennedy,* 96 Tenn., 714, 36 S. W., 709.

Our latest case upon this subject is *Lumber Co.* v. *Moore,* supra, in which we held that the foreign corporation there under consideration had not been engaged in doing business in this State within the meaning of our statutes; but that case, we think, is distinguishable from the present case. In that case, with respect to statutory restrictions upon foreign corporations doing business within the several States, it was said:

"These prohibitions are leveled against the act of foreign corporations entering the domestic State by their agents or engaging in the general prosecution of their ordinary business therein, and they do not apply therefore to acts not constituting any part of their ordinary business."

In that case, upon its facts, we held that the foreign corporation did not maintain its agency in Memphis for the usual and ordinary prosecution of its business within the State, but that it maintained such agency as a matter of convenience for the prosecution of its business in other States. The distinction between that and the present case is that it was the ordinary business of the complainant Amusement Company to send troupes of actors from one theater to another in the State of Tennessee for the purpose of presenting plays to audiences assembled in each separate theater, and from the revenues derived by means of each performance the complainant Amusement Company in its turn under the contract sued on derived an income. The revenues it received arose directly from acts done in Tennessee in the several theaters where the troupes of actors appeared or performed. The contract sued on shows as many as fifty-three different items, each of which represents complainant Amusement Company's share of the revenues received from fifty-three separate and distinct performances by troupes of actors which complainant caused to appear in the one theater of defendants in the city of Chattanooga.

Just how many other theaters in Tennessee were operating under like contracts with the complainant company does not clearly appear in the record; but it is clear that complainant was using each of the troupes of actors for whose performance it seeks to recover in this case as an agency in the carrying on of its regular and ordinary business.

In *John Deere Plow Co.* v. *Wyland,* 69 Kan., 255, 76 Pac., 863, 2 Ann. Cas., 307; *Cone Export & Commission Co.* v. *Poole,* 41 S. C., 70, 19 S. E., 203, 24 L. R. A., 289; *Penn Collieries Co.* v. *Edward J. McKeever,* 183 N. Y., 98, 75 N. E., 935, 2 L. R. A. (N. S.), 127; *A. Booth & Co.* v. *G. M. Weigand,* 30 Utah, 135, 83 Pac., 734, 10 L. R. A. (N. S.), 693, and in the notes upon each of the above cases, an extensive collation of the authorities upon the question here involved, and kindred questions, will be found.

We do not think the present case falls within the doctrine announced in many of the authorities, which hold that an isolated business act within a State does not amount to the carrying on of business; nor do we think the present case falls within the principle announced in other authorities to the effect that business acts done in a State by a foreign corporation which are merely incidental to its business conducted at its domicile are outside of the prohibition of statutes similar in purpose to ours.

On the contrary, we think the present case falls within the general rule that a corporation is doing business within a particular State when it transacts there-

in some substantial part of its ordinary business, continuous in character as distinguished from merely casual or occasional transactions.

A corporation can act only through an agent or agencies; but it does not follow that a foreign corporation can evade our statutes by an insistence that it has no recognized agent in this State, if, under the facts of the case, it is clearly apparent that it is by means of agencies organized as a part of its ordinary business conducting that business continuously and regularly in this State, and deriving therefrom an income.

It may be said that the troupes of actors, by means of whose performances the complainant corporation in the conduct of its business in this State planned to derive its income, were not employed or paid by the complainant corporation, but, on the contrary, were employed and paid by the defendant partnership; but nevertheless each troupe caused by the complainant corporation to appear at the theater of the defendant partnership was an agency used by the complainant corporation in the conduct of its ordinary business, for the purpose of producing for it an income out of the conduct of its ordinary business, and the agency thus used performed the acts from which the income to the complainant corporation resulted in the State of Tennessee.

It is therefore apparent that the income which the complainant planned to derive from the execution of the contract, and for which income it sues to recover in this case, resulted as a sequence of the following

acts in the order named: First, the consent by complainant to the terms of the contract, which consent we must hold was given in Tennessee, since it is clear that the contract was consented to by the defendant partnership at Chattanooga, in that State; second, the engagement by complainant of the troupes of actors to appear on scheduled dates in the theater of the defendant partnership (this act was done, no doubt, by the complainant in its Chicago office); third, the actual appearance of the actors pursuant to this engagement in the theater at Chattanooga, Tenn.; fourth, the collection of admission money from the several audiences by the defendant partnership, and the remittance by it of complainant's share of the money so collected, as that share was fixed by the terms of the contract.

Thus, it is clear that three of the four business acts from which the income sued for resulted were acts done in Tennessee, and done or to be done there under the terms of the contract by the complainant through agencies employed by it. We think this brings it clearly within the general rule already announced.

As bearing upon the subject under discussion, and generally sustaining our views thereof, we cite the following additional authorities: *Chattanooga Bldg., etc., Association* v. *Denson,* 189 U. S., 408, 23 Sup. Ct., 630, 47 L. Ed., 870; *Lumberman's Insurance Co.* v. *Meyer,* 197 U. S., 407, 25 Sup. Ct., 483, 49 L. Ed., 810; *Mutual Life Insurance Co.* v. *Spratley,* 172 U. S., 602, 19 Sup. Ct., 308, 43 L. Ed., 569; *Diamond Glue Co.* v. *U. S. Glue Co.,* 187 U. S., 611, 23 Sup. Ct., 206, 47 L. Ed.,

331; *International Text-Book Co.* v. *Pigg*, 217 U. S., 91, 30 Sup. Ct., 481, 54 L. Ed., 678, 24 L. R. A. (N. S.), 493, 18 Ann. Cas., 1103.

Without further discussion, we hold that the indebtedness evidenced by the account sued on arose out of business conducted in this State by the complainant Amusement Company without precedent compliance on its part with our statutes already cited, and therefore that it cannot maintain this suit.

It results that the decree of the chancellor will be reversed, and the suit dismissed.

WILLIAMS, J. (dissenting).

I do not conceive that there is presented by this record a case of doing business in this State, under the statute cited, on the part of the Amusement Company. It had no plant, property, office, agent, or agency in this State. It was related to the resident firm of Catron & Albert as contractor to contractee, and to nonresident managers or players in like manner, and was but an intermediary. I fail to see how the respective contractual relations, conceived of singly, or (if that were permissible) in conjunction, can be said to fix upon the company the *status* assigned it by the majority.

DOYLE *v.* CITY OF CHATTANOOGA.*

(*Knoxville.* September Term, 1913.)

1. **NEGLIGENCE. Contributory negligence. Acts in emergency.**

Even if contributory negligence could be attributed to a young boy, he would not be guilty of such negligence in jumping into a pond to save his young brother from drowning, having acted in an emergency. (*Post*, *p.* 438.)

Case cited and approved: Railroad v. Ridley, 114 Tenn., 727.

2. **DEDICATION. Streets. Acceptance. User.**

The acceptance of a street by a municipality may be implied from a general and long-continued use thereof by the public as of right. (*Post*, *p.* 438.)

Cases cited and approved: Phillips v. Stamford, 81 Conn., 408; Railroad v. State, 60 Tenn., 55; Hill v. Hoffman (Ch. App.), 58 S. W., 932; Downend v. Kansas City, 156 Mo., 60; Benton v. City of St. Louis, 217 Mo., 687.

3. **DEDICATION. Acceptance of streets.**

The use of a street by the general public may operate as an acceptance thereof so as to bind the dedicator and make the dedication irrevocable. (*Post*, *p.* 440.)

Cases cited and approved: Mathis v. Parham, 1 Tenn. Ch., 533; State v. Hamilton, 109 Tenn., 286.

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*The question of the care required of one in a sudden emergency is treated in a note in 37 L. R. A. (N. S.), 43. And on the question whether voluntarily incurring danger to save the life of another constitutes contributory negligence, see notes in 49 L. R. A., 715 and 27 L. R. A. (N. S.), 1069.

As to whether public user amounts to acceptance of dedicated highway, see note in 18 L. R. A., 510. And for dedication and acceptance of streets so as to make municipality liable for defects or obstructions therein, see note in 20 L. R. A. (N. S.), 558.

The authorities on the doctrine of attractive nuisance are collated in an extensive note in 19 L. R. A. (N. S.), 1094.

4. **MUNICIPAL CORPORATIONS. Acceptance of streets.**

If a strip, offered to be dedicated as a street, contains thereon a nuisance, such as a dangerous pond, slight acts of acceptance by the municipality would be sufficient to show an acceptance so as to make it liable for injuries arising from the pond. (*Post*, *p.* 440.)

Cases cited and approved: Attorney-General v. Abbott, 154 Mass., 323; Town Council v. Lythgoe, 7 Rich. (S. C.), 435; Campbell v. Elkins, 58 W. Va., 308; Brewer v. Pine Bluff, 80 Ark., 489; Gibbs v. Ashford, 27 Tex. Civ. App., 629; Dallas v. Gibbs, 27 Tex. Civ. App., 275.

5. **DEDICATION. Acceptance.**

If the tract dedicated as a street is clearly defined as by a map, and the public use is practically of the whole tract dedicated, it is presumed that an act accepting a part of the tract dedicated is an acceptance of the whole. (*Post*, *p.* 441.)

Cases cited and approved: Town of Derby v. Alling, 40 Conn., 410; Pittsburg v. Epping-Carpenter Company, 194 Pa., 318; Dallas v. Gibbs, 27 Tex. Civ. App., 275; Village of Lee v. Harris, 206 Ill., 428.

6. **MUNICIPAL CORPORATIONS. Dangerous streets. Acceptance of dedication. Sufficiency of evidence.**

Evidence *held* to make it a jury question whether a tract containing a dangerous pond was accepted by a municipality as a street. (*Post*, *pp.* 441, 442.)

7. **NEGLIGENCE. Attractive nuisances.**

The owner of dangerous machinery, naturally attractive to a child, is liable for injuries to one attracted thereto, while the machinery is on the owner's premises. (*Post*, *p.* 444.)

Cases cited and approved: Whirley v. Whiteman, 38 Tenn., 610; Railroad v. Cargille, 105 Tenn., 628; Sioux City, etc., R. Co. v. Stout, 17 Wall., 657; Lynch v. Nurdin, 1 Ad. & E., N. S., 29; Cooke v. Midland, etc., R. C. [1909], A. C., 229; Union Pac. R. Co. v. McDonald, 152 U. S., 262.

Cases cited and distinguished: Cooper v. Overton, 102 Tenn., 211; Railroad v. Ray, 124 Tenn., 16; Bottum's Administrator v. Hawks, 84 Vt., 370.

8. MUNICIPAL CORPORATIONS. Defective streets.

A city was responsible for the death of boys eleven and nine years of age by drowning in a pond which occupied the whole width of a public street, about 120 feet from a public park, in analogy to the rule imposing liability for maintaining an attractive nuisance. (*Post, pp.* 445, 446.)

Cases cited and approved: Busse v. Rogers, 120 Wis., 443; Secard v. Lighting Co., 147 Wis., 614; Kelly v. Southern Wis. R. Co., 152 Wis., 328; Kessler v. Berger, 205 Pa., 289; Kramer v. Southern R. Co., 127 N. C., 328; City of Omaha v. Richards, 49 Neb., 244; Linnberg v. Rock Island, 136 Ill. App., 495.

FROM HAMILTON

Appeal from Circuit Court, Hamilton County.—Frank M. Thompson, Special Judge.

M. N. Whitaker and Jeptha Bright, for plaintiff.

W. L. Frierson and Garvin & Cantrell, for defendants.

Mr. Justice Williams delivered the opinion of the Court.

Under the above case style two separate actions have been prosecuted by M. A. Doyle, as administrator, to recover for the death of each of two sons by drowning in an artificial pond, claimed to be within the limits of a street of the defendant city, known as Bluff street.

It appears that many years ago a quarry was worked, by the then owner of the land, on the site of the pond complained of; the excavation of stone was to a depth of about eighteen feet below the natural surface, and after the abandonment of the quarry water accumulated, forming a pond of that depth, approximately.

The pond covers the entire width of what is claimed to be the street, and overlaps a few feet on some of the abutting lots, hereinafter referred to. The excavation also formed a bluff on and near the side of the street, which bluff overhung precipitously the water in the pond.

The city maintains as pleasure grounds Jackson Park, about 120 feet distant from this pond; a wire fence intervened, over which a stile had been erected, and a path led from this stile towards the pond.

The two deceased sons of plaintiff, one aged eleven and the other aged nine years, with a third small boy, Leiby, went to the park to play, and after swinging in swings, there provided, for a time, one of the Doyle boys suggested that they all go to the pond. This they did; and, after throwing rocks in the pond for a while, they climbed the overhanging stone bluff towards the top, when the younger Doyle lost his footing and fell into the pond. The place where he slipped was on an abutting lot, a few feet from the street's margin. His older brother, Alex, cried to him: "Stay up; I'll get you or go with you." Young Leiby grabbed Alex in an effort to keep him out of the pond, but the latter fought, bit young Leiby, and forced his release,

and then jumped into the pond to rescue his younger brother. Both sank in the water overlaying the street.

The plaintiff administrator seeks to recover on the theory that the city allowed an attractive and enticing nuisance to exist in a public street; the city defends on grounds: (1) That such pond is not such an attractive nuisance as can render the municipality liable; and (2) that there exists no such street as a public highway; that there has never been an acceptance of same on the part of the city authorities or otherwise.

In 1891 a land company platted the territory surrounding this pond into blocks, lots, streets, and alleys, and registered the plat. One of the streets was platted through this pond, Bluff street, which is a short street about three city blocks in length. Later, in 1907, this territory was annexed to the city of Chattanooga. For from ten to twenty years prior to annexation, and ever since, there has been a considerable travel by the usual modes over this street for its entire length, except that when the pond was reached, the travel was diverted over private property just to one side of the pond, and near the street margin, returning again into the street after the pond was passed. This street was level in comparison with other near-by parallel streets, and also ran diagonally, and for these reasons was sought by travelers.

It was in proof that the city had placed a fire plug on Bluff street, and that this street had been platted as such on city map or maps. There was proof that

some work had been done on the street, but it was too indefinite to establish that it was done by the city authorities.

The neighborhood, along cross and parallel streets, is thickly settled, but only a few face Bluff street. Complaints of the pond had been lodged by residents there touching the pond, which could have been fenced or filled. The trial judge excluded proof offered to the effect that other children had been drowned in the pond.

A motion of the city for peremptory instructions in its favor was sustained. On appeal the court of civil appeals affirmed that ruling; and the case is here for review on writ of *certiorari*.

If there be liability on the part of the city for the death of the younger Doyle boy, there would be for the death of his older brother. If contributory negligence could be attributed to a child of tender years in any event, still, he having acted in a sudden emergency to save the life of another in imminent danger, such negligence could not be predicated on his conduct. *Railroad* v. *Ridley*, 114 Tenn., 727, 86 S. W., 606.

One of the main defenses of the city was its nonacceptance of the dedicated street; and on this, chiefly, it prevailed in the lower courts.

"It may now be considered as the prevailing opinion that an acceptance may be implied from a general and long-continued use by the public as of right. The later decisions upon the subject will, when analyzed, be found to be well bedded in principle. . . . The

municipal corporation consists of the inhabitants and not the officers; the officers are, in truth, nothing more than the agents of the corporation. The inhabitants, therefore, stand to the officers as principals, and if the principals have, by their conduct, accepted the dedication, it is of no great importance that the agents have taken no action in the matter. The inhabitants of a locality having, by long-continued use, treated the way as a public one, they make it such without the intervention of those who derive their authority from them." Elliott, Roads & St. (2 Ed.), sec. 154; 3 Dillon, Mun. Corp., sec. 1087; *Phillips* v. *Stamford,* 81 Conn., 408, 71 Atl., 361, 22 L. R. A. (N. S.), 1114; *Southern P. R. Co.* v. *Ferris,* 93 Cal., 263, 28 Pac., 828, 18 L. R. A., 510 and note.

The contrary doctrine is declared in 13 Cyc., 467; but our case of *Railroad* v. *State,* 1 Baxt., 55, as construed and followed in *Hill* v. *Hoffman* (Ch. App.), 58 S. W., 932, opinion by the present chief justice, evidences, to say the least, a trend toward the doctrine announced by Elliott and by Dillon. However, a decision of this case would not necessarily call for a ruling on that point, though it may be noted that the great weight of authority is in favor of the rule thus declared. Indeed, the case most relied upon by the writer of Cyc.'s article on Dedication (*Downend* v. *Kansas City,* 156 Mo., 60, 56 S. W., 902, 51, L. R. A., 170), has been repudiated by the same court in the later case of *Benton* v. *City of St. Louis,* 217 Mo., 687, 118 S. W., 418, 129 Am. St. Rep., 561, and see mono-

graphic note appended, the writer of which, after summarizing the cases, stated that the decided weight of authority is as we have indicated. We hold, in accord with our previous cases, to that rule.

Certain it is that, even under the minority rule, a user by the general public, in its unincorporated capacity, may operate as an acceptance on its part, binding the dedicator by way of consummating the dedication, and placing it beyond revocation on his part. 13 Cyc., 465; *Mathis* v. *Parham,* 1 Tenn. Ch., 533; *State* v. *Hamilton,* 109 Tenn., 286, 70 S. W., 619.

If, in this attitude of the way, under that rule, there be therein a nuisance, such as a dangerous artificial pond, it seems to us that it would be a harsh pronouncement of the law that any liability therefor continues to rest on the dedicator; the public in travel enjoying the use of the way the while. *Attorney-General* v. *Abbott,* 154 Mass., 323, 28 N. E., 346, 13 L. R. A., 251.

Under such conditions, slight acts of acceptance on the part of the incorporated body, standing for that public, should be sufficient to bring upon it the burdens, as well as the benefits, of the dedication.

In *Town Council* v. *Lythgoe,* 7 Rich. (S. C.), 435, it was held "that digging a well in the way was evidence of acceptance" by the municipality, and of the decision it is said in Elliott, Roads and Streets, 116: "We have no doubt of the soundness of this decision, for, no matter what the particular act is, if it be one which could only be rightfully done on a highway, it should be regarded as evidence of acceptance." See,

also, Dil. Mun. Corp. (5 Ed.), sec. 1807, note; *Campbell* v. *Elkins*, 58 W. Va., 308, 52 S. E., 220, 2 L. R. A. (N. S.), 159; *Brewer* v. *Pine Bluff*, 80 Ark., 489, 97 S. W., 1034. It would seem that the placing of a fire plug within the limits of Bluff street is one so similar as to be the legal equivalent of the act of digging a well.

The execution of an official map by the city, showing the street offered to be dedicated to be such, has also been held to be evidence of an acceptance. *Gibbs* v. *Ashford*, 27 Tex. Civ. App., 629, 66 S. W., 858; *Dallas* v. *Gibbs*, 27 Tex. Civ. App., 275, 65 S. W., 81.

Where the dedication is clearly defined, as in this case by registered map, and the public user is of the whole, practically speaking, the presumption is that an act of acceptance of a part thereof is an acceptance of the whole. *Town of Derby* v. *Alling*, 40 Conn., 410; *Pittsburg* v. *Epping-Carpenter Company*, 194 Pa., 318, 45 Atl., 129; *Dallas* v. *Gibbs*, 27 Tex. Civ. App., 275, 65 S. W., 81; *Village of Lee* v. *Harris*, 206 Ill., 428, 69 N. E., 230, 99 Am. St. Rep., 176; 3 Dil. Mun. Corp. (5 Ed.), sec. 1088. If we were proceeding under the minority rule, it would not be necessary for us to decide that either of the above acts—the placing of the hydrant or the execution or adoption of the official map—would of itself support a finding of acceptance on the part of a municipality, under the situation referred to, since here both of these acts concur, in combination with long user of the street by the public, beneficial to the public. There was sufficient evidence, in

any view, to take the case to the jury on the question of fact of acceptance by the public authorities.

If, therefore, the quarry pond may be deemed, or may be by a jury found, to be within the limits of Bluff street, may the City of Chattanooga be held liable to the plaintiff administrator on his contention that the city had permitted the pond to exist as an attractive nuisance?

This court is committed to the doctrine of the liability of the owner for the maintenance of negligently exposed dangerous machinery, attractive to a child, in the exercise of his natural instinct or curiosity injured thereby, even though the machinery was on the owner's private premises. *Whirley* v. *Whiteman,* 1 Head, 610.

The principle was applied by this court to a turntable, so maintained, in *Railroad* v. *Cargille,* 105 Tenn., 628, 59 S. W., 141, which cites as authority the "turntable case" of *Sioux City, etc., R. Co.* v. *Stout,* 17 Wall., 657, 21 L. Ed., 745, which cited and relied on the case of *Lynch* v. *Nurdin,* 1 Ad. & E., N. S., 29, 1 Q. B., 30, 41 E. C. L., 422, as did also our case of *Whirley* v. *Whiteman,* supra.

The English courts have recently approved *Lynch* v. *Nurdin,* and carried forward its doctrine in an application of same to a turntable case (*Cooke* v. *Midland, etc., R. C.* [1909], A. C., 229, 5 Ann. Cas., 557); while the supreme court of the United States has adhered to the doctrine of the *Stout case,* and evinced its willingness to advance its application to case of attractive nuisance in the form of a slack pit, beneath the sur-

face of which the slack was burning. Mr. Justice HARLAN, in the opinion, said: "If the company left its slack pit without a fence around it, or anything to give warning of its really dangerous condition, and knew or had reason to believe, that it was in a place where it would attract the interest or curiosity of passers-by, can the plaintiff, a boy of tender years, be regarded as a mere trespasser, for whose safety and protection while on the premises in question, against the unseen danger referred to, the railroad company was under no duty or obligation whatever to make provision?" *Union Pac. R. Co.* v. *McDonald,* 152 U. S., 262, 14 Sup. Ct., 619, 38 L. Ed., 434, holding liability.

Many of the State courts of last resort have, however, declined to accept the doctrine of the turntable case; and others, which apply it to turntables and other dangerous machinery on private premises, deny its application to artificial ponds so located. Many of the authorities are reviewed in the case of *Cooper* v. *Overton,* 102 Tenn., 211, 52 S. W., 183, 45 L. R. A., 591, 73 Am. St. Rep., 864, and *Railroad* v. *Ray,* 124 Tenn., 16, 134 S. W., 858, Ann. Cas., 1912D, 910, *Bottum's Administrator* v. *Hawks,* 84 Vt., 370, 79 Atl., 858, 35 L. R. A. (N. S.), 440, Ann. Cas., 1913A, 1025, and note.

We need only observe that we have not in the case in hand an attractive nuisance on private premises. However, the courts that deny liability in turntable cases do so on the ground that under common law principles, as construed by them, the attractiveness of the instrumentality or object causing the injury cannot be

construed into or as the equivalent of an invitation to a child, on the part of the owner of the premises, and that, without an invitation, express or implied, no duty of active care arises even in respect of a child of tender years going on the premises.

In the case at bar, the attractive object was in a place (within the limits of a public street) where a child had a right to go, on invitation such as is impliedly given to the public at large. A trespass could not be imputed to an approach to or use of such a public street. The city cannot be heard to say that the boys were without invitation to go upon the street. Therefore the point of difficulty with some courts in granting remedy in cases of the character noted does not here appear.

In the case of *Busse* v. *Rogers*, 120 Wis., 443, 98 N. W., 219, 64 L. R. A., 183, it was held that one who, is using a street adjoining his property piled lumber there in an unstable manner was liable for injuries caused by its fall upon a child who, in play, attempted to climb upon the pile, and thereby caused the lumber to fall. The court said: "This is not the case of an owner of land putting an attractive and lawful but dangerous machine or thing upon his own property and leaving it ungaurded. It is the case of an owner placing an unlawful nuisance in the highway and leaving it unguarded . . . Had a loose timber fallen from the pile by reason of sole negligent piling, and injured a traveler passing on the sidewalk, there would be but little doubt of the liability of defendants, and of the

city as well, provided the danger was one which had existed long enough so that the city officials should have known of it. . . . The central idea is that children are liable always to be upon the public streets, and also are liable to turn aside from traveling and play, or meddle with attractive things left thereon; that a reasonable man must bear this fact in mind, and hence may not negligently or willfully place upon the street a dangerous . . . trap, well calculated to arouse the admiration or curiosity of a child, and, when it has accomplished the natural result which might be reasonably expected escape the consequences by saying that the injured child should not have yielded to his curiosity." In accord are the later cases of *Secard* v. *Lighting Co.*, 147 Wis., 614, 133 N. W., 45; *Kelly* v. *Southern Wis. R. Co.*, 152 Wis., 328, 140 N. W., 60, 44 L. R. A. (N. S.), 487; *Kessler* v. *Berger*, 205 Pa., 289, 54 Atl., 887, 61 L. R. A., 611.

In *Kramer* v. *Southern R. Co.*, 127 N. C., 328, 37 S. E., 468, 52 L. R. A., 350, the same doctrine was held and applied.

In *City of Omaha* v. *Richards*, 49 Neb., 244, 68 N. W., 528; *s. c.*, 50 Neb., 804, 70 N. W., 363, it appeared that the city had allowed a pond to collect in an accumulation of surface water on a portion of a street and abutting lots and that a boy, ten years old, got on a detached plank of a sidewalk, at the time floating on the water, and used same as a raft, and while so doing was drowned in water that overlaid the lots of the abutting owner.

The pond was near a public school building and without safeguards. The court held that it "was negligence on the part of the city to leave the pond of water unguarded, knowing that children would be attracted to such a place." See, also, *Linnberg* v. *Rock Island,* 136 Ill. App., 495.

The city of Chattanooga, which was under obligation in its corporation capacity to abate nuisances, has permitted a condition to exist in one of its streets liable to cause injury to children of tender years, when a jury might find it knew or should have known that children were liable to be lured thereby to hurt or death. Whatever may be claimed for an owner of private premises on which such a pond is allowed to exist, or for the argument based upon the *meum* and *tuem* view of property rights, lying so pronouncedly at the base of the decisions in favor of such private owner, we hold that a city cannot, under the circumstances here appearing, stand acquitted as having had due regard for the protection of the child life within its borders; and this regard the law, in its increasing humanity, should be solicitous to enforce.

In withdrawing the two cases against the city from the jury there was error; each is reversed and remanded; costs of the appeal will be paid by the city.

AMERICAN ZINC CO. *v.* SMITH.*

(*Knoxville.* September Term, 1913.)

1. **MASTER AND SERVANT. Master's liability. Servant's duty to obey rule. "Nondelegable."**

While in instances the giving of signals may be the nondelegable duty of the master, the term "nondelegable" does not mean that the master may not impose upon a servant the duty of giving signals prescribed for his own safety, and where such signals are not given at such a place as his duty requires he cannot recover for injury resulting therefrom. (*Post*, *p.* 451.)

Cases cited and approved: Atchison, etc., R. Co. v. Reesman, 60 Fed., 370; New York, etc., R. Co. v. Ropp, 76 Ohio St., 449.

2. **MASTER AND SERVANT. Master's liability. Noncompliance with rules.**

Deceased, with other machinists, descended in a mining shaft to repair a pump after being warned by the master carpenter, repairing the upper part of the shaft, that they should not come into the shaft until they notified him by knocking on a pipe; but when the repair was finished the foreman said, "Come on," and went into the hoisting basket, followed by deceased, who, as he was getting into the basket, was hit by a piece of timber falling from the carpenters' work and killed. *Held*, that deceased had no right to infer that the foreman had obeyed the rule as to notice, and that, as he himself could have given notice, his failure to observe the rule was negligence, defeating a recovery. (*Post*, *p.* 454.)

Case cited and approved: Central R. Co. v. Kitchens, 83 Ga., 83.

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*The authorities on the question of the duty of the servant in regard to the rules promulgated by his employer are collated in a note in 43 L. R. A., 350, 363. And for disobedience of master's rules as contributory negligence, see note in 24 L. R. A., 657.

The question whether the duty of the master to instruct or warn servants is delegable is the subject of a note in 26 L. R. A. (N. S.), 624.

FROM KNOX.

Appeal from Circuit Court, Knox County.—Von A. Huffaker, Judge.

Cornick, Frantz, McConnell & Seymour, for appellant.

Pickle, Turner & Kennerly, for appellee.

Mr. Justice Williams delivered the opinion of the Court.

This suit was brought by Mrs. Bertie Smith to recover of the American Zinc Company for the death of her husband, James C. Smith, which occurred in a mining operation.

Deceased was an experienced machinist in the employ of the company, under a master machinist, Edleman, his foreman, and at the time was engaged in attending to the repair of pumps in the mine then being driven. He was ordered by Edleman to accompany him and a second assistant, Caine, down a shaft of the mine to repair a pump. The three used for descent a hoisting apparatus. A head carpenter and several assistants were engaged in lining the shaft with lumber, and as the three machinists started down the head carpenter cautioned all of them to signal to him

by tapping on a pipe line, that extended up the shaft, before coming from the pump into the shaft to make the ascent; this, so that the carpentry crew could discontinue work above and avoid injury to the machinists by falling timber being worked by the carpenters or by rock dislodged by them. After fixing the pump, the deceased, Smith, for the machinists, before going from the pump into the shaft, tapped on the pipe line without direction from his foreman so far as the proof shows. The head carpenter gave a return signal that all was right, and the machinists reached the surface in safety.

The pump did not work promptly, and Foreman Edleman again took his crew down the shaft to give it further attention, when they were again warned by the head carpenter: "Whatever you do, don't come about that shaft until you let me know you are coming."

These warnings were in accord with a rule of the company in proof to this effect: "The rule of the mine with respect to the protection of the men coming into the shaft where the timbering was going on was that anybody coming to the bottom of the shaft would knock on the pipe, and the timbermen were to answer by rapping on the pipe and calling down." The proof further establishes that under the rule any workman desiring to go up the shaft was to give the signal or to see that it was given. In going into the shaft for the second ascent, no signal was given by either of the three machinists. Foreman Edleman said, "Come on, we

will ascend to the surface," and all started together. Edleman went to the hoisting basket, and got in; Caine followed next, and got in; and as deceased approached the basket and was in the act of getting in, a block of timber fell from where the carpenters were at work, about 180 feet above, and hit and instantly killed Smith.

It appears from the testimony that the pump was located out of danger range about eight feet from the shaft, and that the sound produced by tapping on the pipe line could be heard for several hundred feet from the shaft.

The company made a motion for peremptory instructions in its favor, but this was overruled. The case went to a jury, which gave plaintiff a verdict.

The disposition of the case in the court of civil appeals is best shown by an excerpt from its opinion, as follows:

"The sole question in this case, as we view it, is: Was the foreman guilty of negligence in failing to notify the carpenters at work above them in the shaft of the fact that they were entering the elevator to be carried to the surface?

"The proof is not clear as to what was said when the foreman said to the deceased and the other employee, 'Let us return to the surface.' As a matter of fact, he entered the basket of the elevator first, and it was his duty to tap the pipe to notify the carpenters above of the fact that they were there to be carried to the surface.

"The case runs along a narrow margin, but we think the deceased lost his life by virtue of this negligence of the foreman, and the whole charge of the trial judge embraced in the assignments of error revolves around this sole question as to whether or not the foreman was guilty of negligence in failing to notify the carpenters above that they were entering the elevator for the purpose of being carried to the surface. If it was also the duty of the deceased to notify them, then his representative could not recover in this case; but we think he had the right to rely upon the fact that the foreman, who preceded him in entering the elevator, had notified the carpenters above of their intention to be carried to the surface."

It will be noted that the court of civil appeals held that, if it was the duty of the deceased, Smith, to notify the carpenters above, by means of the signal, there could be no recovery in this case. This is a true conception and statement of the law. While in instances the giving of signals may be the nondelegable duty of the master, it is not meant by the word "nondelegable" that the master may not impose the duty upon a given employee to give signals prescribed for his own safety.

"An action cannot be maintained where it was the duty of the injured servant to direct other employees by means of signals, and the injury was due to the fact that those signals were improperly given, or were not given at such time and place as his duty required."

3 Labatt, Master & Servant (2 Ed.), sec. 1260; 26 Cyc., 1264.

While the proof does show that the duty to give the signal was imposed upon Edleman, as foreman, it also further shows that the same duty under the rule rested equally and alike upon deceased.

That court was further of the view, as we construe the opinion, that deceased had the right to rely upon the fact, as excusing him from giving the signal, that the foreman, Edleman, in leading the way to the basket for ascent, had given the signal, and therefore its ruling was in favor of the plaintiff on the motion for peremptory instructions.

As was indicated by the court of civil appeals, the margin for liability was, in its opinion, a narrow one, and the authorities ruling the point appear to be by no means numerous.

In the case of *Atchison, etc., R. Co.* v. *Reesman,* 60 Fed., 370, 378, 9 C. C. A., 20, 28, 23 L. R. A., 768, 772, it was urged in behalf of an injured brakeman, plaintiff, that his disobedience of the company's rules, though it contributed to his injury, should not be accounted to him as contributory negligence, because the disobedience was with the knowledge and consent of the conductor as his superior. Mr. Justice Brewer, sitting at circuit as circuit justice, delivering the opinion of the court, said: "The duty of obedience to the rules of the employer is one resting alike upon all employees; and, when an employee claims to recover from his employer for injuries resulting through the latter's

negligence, he cannot escape the consequences of his own act contributing to such injury—an act done in known violation of the rules of such employer—on the ground that his immediate superintendent knew and assented to such act of violation. If it were otherwise, then the supineness and negligence of any superintending officer of a corporation would relieve a subordinate from responsibilty for his own conduct. In other words, the wrong of one employee is excused by a like wrong of another. The employee injured through his own omission of duty escapes liability for such omission because some other employee is equally careless."

The recent case of *New York, etc., R. Co.* v. *Ropp*, 76 Ohio St., 449, 81 N. E., 748, 11 L. R. A. (N. S.), 413, involved a claim of an employee (Ropp) that his failure to obey a rule respecting signaling was excused by the presence and consent of his superior (Whalen). The court said: "This theory of the case does not seem to us to be tenable. For aught that appears, the rules were equally obligatory on both Whalen and the plaintiff. They certainly were binding on the plaintiff, and the violation of the rules by Whalen, whether he were a superior or not, could not release the plaintiff from his contractual obligation, which was made for the benefit of both himself and his employer. . . . Neither can such authority [of Whalen to suspend the rule as to Ropp] be implied from the fact that Whalen had authority to direct and control the plaintiff in the performance of his duties as a car repairer. His authority to control and direct was authority to

control and direct within the limitations of the rules prescribed by the company for the government of all employees. . . . Nor had the plaintiff the right to infer a waiver of the rule in any case. There is not even room for an argument from the necessity of the case; for the plaintiff could have obeyed the order of his superior and still have protected himself from injury by obeying the rule."

We need not, in the pending case, hold that a superior cannot in any case, for lack of authority, so order an inferior employee as to free the latter from the obligation of a given rule binding alike on both, for here there was no order or direction proceeding from the superior to Smith to disregard the rule prescribed for their protection. This was also true in the Ohio case, in which the court further, in this connection, wrote: "Although the plaintiff had not been told by Whalen to disregard the rule, and although he had not looked to see if the signals were placed, and nothing had been said on the subject," it is claimed that "he had the right when called by Whalen to come and help him on the repairs on which Whalen was working, to take it for granted that Whalen had done his duty, or to infer from Whalen's conduct and surrounding circumstances that the rule was suspended for the time being"—and the court denied that the plaintiff employee had the right to so infer. See, also, *Central R. Co.* v. *Kitchens*, 83 Ga., 83, 9 S. E., 827; 26 Cyc., 1270.

In our opinion, the rule thus last declared is sound, and, further, that it is applicable to the facts of the

case at bar. Smith had no right to infer that Edleman was by closer attention and compliance absolving him from an observance of the rule, reinforced by the cautions given immediately before to him and Edleman alike. If it be conceived that Edleman directed Smith to follow him out into the shaft and into the basket, then for aught that appears Smith could have done so, and also have complied with the rule by tapping the signal on the pipe line. If Edleman disregarded the rule, that fact did not operate to acquit deceased of negligence in respect of his own omission.

Other contentions are disposed of orally.

The motion for peremptory instructions should have been sustained. Reversed, with judgment here in accord.

STATE *ex rel.*, NATIONAL CONSERVATION EXPOSITION CO. *v.* WOOLEN, *State Comptroller.*

(*Knoxville.* September Term, 1913.)

1. **STATUTES. Powers of legislature. Extraordinary session. Appropriations.**

Under Const., art. 3, sec. 9, authorizing the governor, on extraordinary occasions, to convene the general assembly by proclamation, "in which he shall state specifically the purposes for which they are to convene, but they shall enter on no legislative business except that for which they were specifically called," the governor can limit the subject which the legislature can consider, and he can do this by the imposition of qualified matter upon a general subject; hence he could qualify the general subject "appropriations" by "necessary to maintain the State's institutions." (*Post*, *pp.* 488, 489.)

Cases cited and approved: People, ex rel., v. Johnson, 23 Colo., 153; Brown v. State, 32 Tex. Cr. R., 119; Baker v. Kaiser, 126 Fed., 321; State v. Shores, 31 W. Va., 491; Stockard v. Reid, 57 Tex. Civ. App., 126; Mitchell v. Turnpike Co., 22 Tenn., 456; Devereaux v. City of Brownsville [C. C.], 29 Fed., 742; Baldwin v. State, 21 Tex. App., 591; Wells v. Missouri Pac. Ry. Co., 110 Mo., 286.

2. **CONSTITUTIONAL LAW. Presumption in favor of validity.**

A presumption is always in favor of the constitutionality of an act. (*Post*, *pp.* 475-487.)

3. **STATUTES. Enactment at extraordinary session. Proclamation of governor. "Maintain." Appropriations.**

An appropriation of $25,000 to the National Conservation Exposition Company, a corporation, created for the purposes of holding expositions, encouraging and supporting agriculture, industrial enterprises, and the breeding of blooded live stock and poultry, made by the legislature in extraordinary session, and contained

in the general appropriation bill under the head of "Department of Agriculture," was not embraced within the call of the governor, which was "to make such appropriations of the public moneys as may be deemed necessary and proper to maintain the State's institutions, offices and departments," since, though some of the purposes of the corporation were identical with those of the agricultural department, and it, in carrying out its purposes, might indirectly aid the department, it was a separate institution in no way connected with the agricultural department, and the word "maintain" as used in the governor's call meant, if not direct maintenance by an appropriation to the department itself, at least one under its control; hence the appropriation was void, because in violation of Const., art. 3, sec. 9, authorizing the governor to convene the general assembly by a proclamation limiting their power specifically to the purposes for which they are convened. (*Post*, *pp.* 491, 492.)

4. STATES. Validity. Persons entitled to question.

The officers of the State upon whom is imposed the duty of disbursing the public funds can question the validity of an appropriation made by the legislature. (*Post*, *pp.* 489, 490.)

Case cited and approved: Shelby County v. Exposition Co., 96 Tenn., 660.

FROM KNOX.

Appeal from Chancery Court, Knox County.—WILL D. WRIGHT, Chancellor.

FRANK M. THOMPSON, Attorney-General, for appellant.

SHIELDS & CATES, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

Finding an excellent statement of the case and of the facts in the brief of the counsel for the complainant, we adopt it as follows:

"The State of Tennessee on relation of the National Conservation Exposition Company, filed this petition in the chancery court at Knoxville to compel the defendant, George P. Woollen who is the comptroller of the treasury of the State of Tennessee, to issue the comptroller's warrant for an appropriation for $25,000, which was made to the National Conservation Exposition Company by the 'general appropriation bill' passed by the extra session of the 58th General Assembly of the State of Tennessee, being Senate Bill No. 1 and chapter 19 of said Acts.

"The defendant George P. Woollen filed a demurrer to this petition, by which he challenged the constitutionality of said appropriation, and resists the prayer of the petition upon the following three grounds, to-wit:

"First. He insists that the proclamation of the governor convening the 58th General Assembly in extraordinary session does not 'state specifically' that the appropriation of $25,000 to the National Conservation Exposition Company is one of the 'purposes for which they are to convene,' and that said appropriation is unconstitutional and void, in that it contravened article 3, section 9, of the constitution of the State of Tennessee.

"Second. He insists further that he cannot be made to issue a comptroller's warrant for an unconstitutional appropriation, and that a peremptory *mandamus* commanding him to do so in this case would violate article 2, section 24, of the constitution of Tennessee, which provides that 'no money shall be drawn from the treasury but in consequence of appropriations made by law.'

"Third. He insists, further, 'that the attempted appropriation and setting apart of the public moneys to the relator, a private corporation, by said Senate Bill No. 1 was beyond and outside of the caption thereof.'

"This cause was heard by the chancellor on the bill and demurrer on October 28, 1913. The chancellor overruled the defendant's demurrer and ordered him to make further defense to said petition; but he declined to do so, and elected to stand and rely upon said demurrer as his sole defense to the petition. That part of the decree showing this fact is as follows:

" 'It is therefore decreed by the court that the said demurrer be and the same is everruled, and that the defendant shall answer said petition; but the defendant, being in court through and by his counsel, the attorney-general and reporter of the State of Tennessee, declined to make other or further answer or defense to said petition than is made by said demurrer, and elects to stand and rely upon said demurrer.'

Thereupon the chancellor entered a decree ordering the clerk and master to immediately issue a mandatory *mandamus* commanding and compelling the defendant

to issue his comptroller's warrant to the National Conservation Exposition Company upon the treasury of the State of Tennessee for said $25,000 appropriation.

"From this decree, the defendant prayed, and has perfected an appeal to this honorable court, and has assigned errors by which he raises the same questions that are raised by his demurrer.

"The undisputed facts are as follows, to-wit:

"The National Conservation Exposition Company is a corporation organized under the laws of the State of Tennessee for the purpose, as stated in its charter, 'of holding and conducting expositions and amusements; to promote the conservation and development of natural resources, the encouragement and support of agricultural, horticultural, industrial enterprises, commerce, and the breeding and raising of blooded live stock and poultry.'

"In the latter part of 1912 the National Conservation Exposition Company began preparations to hold an exposition at Knoxville, Tennessee, beginning September 1, 1913, and ending November 1, 1913, 'for the purpose and with the result of promoting the highest development and best uses of the natural resources of this country; to illustrate and teach the ways in which the wealth in lands, forests, waters, minerals, wild animal life, and human efficiency may be more effectively promoted and utilized; to teach the use of modern machinery, and show how it lightens labor and increases production; to promote, encourage, and teach our farmers how to improve their soil, and produce

better and more farm products; to incite industry, thrift, development, and worthy emulation in the different avenues of commerce, agriculture, manufacture, art, and education within the State, thereby tending to the permanent betterment and prosperity of the whole people; and to advertise to the world the natural resources and wealth of our State, and thereby encourage immigration to the State and the building up and development of all our resources, which will inure to the benefit of the State and its entre population.'

"In accomplishing these purposes the National Conservation Exposition Company 'spent over $350,000 in erecting buildings in which to exhibit our resources, and in obtaining material for teaching the purposes of the exposition by object lessons, in paying premiums to our farmers for the best exhibits of all farm products by them, and of all poultry and live stock raised and exhibited by them, and in advertising the exposition and its purposes throughout the United States.'

"Early in the regular session of the general assembly of the State of Tennessee for the year 1913, and while the petitioner was getting together an exhibit of the natural resources of Tennessee, 'a bill was introduced in the house and senate appropriating $30,000 to the National Conservation Exposition Company to be expended by it in gathering, assembling, housing, and exhibiting an agricultural, horticultural, forestry, and mineral exhibit of the resources of the State of Tennessee. This bill passed the senate, but was held up in the house behind a multiplicity of bills, and was

never reached on the calendar. During this same general assembly, however, there was introduced a general appropriation bill by which an item of $30,000 was appropriated to the National Conservation Exposition Company to defray part of the expenses of its exhibition of the natural resources of the State. This bill passed the senate and house, but was vetoed by the governor on the ground that it passed the house when no quorum was present. When the house reassembled, it was passed over the governor's veto but at a time when the quorum was broken during the call of the roll on the bill, and because of that complication the the bill failed to pass over the governor's veto in the senate. . . . After the passage of this general appropriation bill, the National Conservation Exposition Company actually expended on the faith of this appropriation more than $30,000 in getting exhibits of the agricultural, mineral, and timber exhibits of the State, and more than that amount of money in agricultural exhibits alone.'

"On August 29, 1913, the Honorable Ben W. Hooper, Governor of the State of Tennessee, issued a proclamation to the members of the 58th General Assembly of the State of Tennessee, reciting that 'the public welfare demands legislation upon several matters of general and local interest which are of such importance as to create extraordinary occasion for the assembling of the legislature of the State of Tennessee,' and, by virtue of the authority vested in him by article 3, section 9, of the constitution of Tennessee, he called the

members of the 58th General Assembly of Tennessee to convene in extraordinary session in the Capitol at Nashville on Monday, September 8, 1913, 'for the purpose of considering and acting upon the following matters of legislation:

"'(1) To make such appropriations of the public moneys as may be deemed necessary and proper to maintain the State's institutions, offices, and departments, with the exception of educational institutions; these having been liberally provided for at the regular session.'

"In pursuance of this proclamation the members of the 58 General Assembly of the State of Tennessee convened in extraordinary session in the Capitol at Nashville on Monday, September 8, 1913, and enacted, among other legislation, 'Senate Bill No. 1,' the provisions of which in so far as they affect the questons involved in this controversy are as follows, to-wit:

"'Senate Bill No. 1.

"'General Appropriation Bill.

"'An act to appropriate money out of the State treasury for the purpose of defraying the expenses of the State government for two years commencing March 19, 1913.

"'Section 1. Be it enacted by the general assembly of the State of Tennessee, that the appropriations hereinafter set out are hereby made for the purpose of defraying the expenses of the State government for two years commencing March 19, 1913, which appropria-

tions shall be paid out of the State treasury upon the warrants of the comptroller.'

"This act declares 'that the appropriations hereinafter set out are hereby made for the purpose of defraying the expenses of the State government for two years commencing March 19, 1913, which appropriations shall be paid out of the State treasury upon the warrants of the comptroller.' In subheadings under the general headings 'Judiciary,' 'Office of Governor,' 'Department of History,' 'Archives,' and 'Office of Insurance Commissioner,' it appropriates moneys for the payment of salaries and all classes of expenses germane to these general subjects.

"In subheadings under the next general heading of 'Office of Commissioner of Agriculture,' it appropriates moneys for the payment of the salaries of the commissioner and all of his clerks and his office expenses, to establish a 'Serum Plant,' for 'Live Stock Sanitary Control,' for holding 'Farmers' Institutes,' for the 'State Board of Entomology,' for the 'Bureau of Immigration,' and for the 'Department of Agriculture.' Under the subheading 'Department of Agriculture' the following appears, to-wit:

"'Department of Agriculture.

For State laboratory, $3,500.00, annually... $7,000 00

"'(Act General Assembly 1913, House Bill No. 137.)

To the Recreation Park Commission of Memphis, as created by the Acts of General Assembly, chapter 5, Acts of 1911, for the erection of a State building or

buildings within which there is to be collected, housed and exhibited resources of the State of Tennessee, for the Tri-State Fair at Memphis $25,000 00

" 'The building or buildings to be erected under the direction of the commissioner of agriculture, and all expenditures made out of this appropration to be first approved by the said commissioner.

To the National Conservation Exposition Co., Knoxville, Tennessee ..... $25,000 00.'

"[Acts 1913 (1st Ex. Sess.), ch. 19.]"

The original capital stock authorized by the charter of the National Conservation Company was $100,000. Amendments were subsequently made which authorized the stock to be raised to $1,000,000.

It is not shown that this corporation is in any wise under the control of the department of agriculture, or connected therewith organically or otherwise, save that some of its purposes, already outlined, are the same as those for which the agricultural department was established.

It is insisted by the attorney-general for the defendant that the appropriation in favor of the National Conservation Exposition Company was not embraced wthin any of the purposes of the special call made by the governor convening the legislature in extra session, and therefore that so much of the act as made that appropriation was unconstitution and void.

The section of the constitution (article 3, section 9) which controls this subject reads as follows:

"He [the governor] may, on extraordinary occasions, convene the general assembly by proclamation, in which he shall state specifically the purposes for which they are to convene; but they shall enter on no legislative business except that for which they were specifically called together."

It is insisted for the complainant that, while article 3, section 9, of the constitution, requires the governor's proclamation for convening an extraordinary session of the legislature to "state specifically the purposes for which they are to convene," and provides that the legislature "shall enter on no legislative business except that for which they were specifically called together," yet that it is "perfectly well-settled law that they can constitutionally enact any legislation that is germane to the general purpose stated in the proclamation, and that an attempt in the proclamation to abridge this power is absolutely void"—citing *People, ex rel.*, v. *Johnson*, 23 Colo., 153, 46 Pac., 681; *Brown* v. *State*, 32 Tex. Cr. R., 119, 22 S. W., 596-602; *Baker* v. *Kaiser* 126 Fed., 321, 61 C. C. A., 303; *State* v. *Shores*, 31 W. Va., 491, 7 S. E., 413, 13 Am. St. Rep., 879; *Stockard* v. *Reid*, 57 Tex. Civ. App., 126, 121 S. W., 1144; *Mitchell* v. *Turnpike Co.*, 3 Humph., 456; 1 Sutherland on Statutory Construction, p. 112.

We shall now state the substance of these cases:

People, ex rel. v. *Johnson.* This action grew out of a contest between two factions, each claiming the right

to file nominations of and for the "People's Party," and to use the emblem of that party, to-wit, the device known as the "cottage home." Each faction claimed that it constituted the only genuine "People's Party;" one convention having met in the city of Denver on September 7, 1896, and the other in the city of Pueblo two days later. The contest originally arose before the secretary of State, who decided in favor of the list of nominees selected at Denver, and that the ticket so nominated was entitled to use the emblem in question. From the secretary of State the matter was carried into the district court of Arapahoe county. That court, upon a final hearing, decided in favor of the ticket nominated at Pueblo, and directed the secretary of State to certify that ticket upon the official ballots, giving to it the emblem and name of the "People's Party." The unsuccessful faction applied for a writ of prohibition to restrain the district court from carrying its judgment into effect. The jurisdiction of the district court thus challenged was the only question before the court. That jurisdiction was attacked on two grounds, the first of which was as follows:

"The act relied upon to support the jurisdiction having been passed at the special 1894 session of the legislature, it is claimed it is void and of no force or effect because not embraced within the call by the governor for such special session."

This is the only point we are concerned with.

Speaking to this matter, the court said:

"In support of the first ground section 9 of article 3 of the State constitution is relied upon. It reads:

" 'Sec. 9. The governor may, on extraordinary occasions, convene the general assembly by proclamation, stating therein the purpose for which it is to assemble; but at such special session no business shall be transacted other than that specifically named in the proclamation. . . . '

"The call for the special session of the legislature in 1894, issued in pursuance of the foregoing constitutional provision, contained, among other subjects submitted for legislation, the following:

" '(29) To enact that the law in relation to elections, etc., in this State, known as the "Australian Ballot Law," be amended so as to provide:'

"This is followed by paragraphs designating in detail the amendments which the executive desired the legislature to make. The governor, by specially designating in the proclamation convening the general assembly as one of the subjects of legislation the law in relation to elections, etc., in this State, known as the 'Australian Ballot Law,' for amendment, must be held to have submitted the whole subject-matter of such act for legislative action thereon. He had no more authority to go farther than this and specify the particular character of the amendments that were to be voted upon than he would have had to have prepared the bills, and attached them to his call, and directed the legislature to have passed or rejected the same without amendment. Such specific instructions can, at best, be

regarded as advisory only, and not as limiting the character of legislation that might be had upon the general subject of the Australian ballot law."

Baker v. *Kaiser*. This case also concerns the constitutional provisions of Colorado considered in the case just quoted. The opinion was rendered in the United States circuit court of appeals for the eighth circuit. The following excerpt from that opinon shows sufficiently the contents of the case upon the subject:

"The constitution of the State of Colorado provides that in the calling of special sessions of the general assembly the governor shall indicate the subjects of legislation to be dealt with, and that the business of any such session shall be confined to the matters specifically mentioned in the proclamation. The act under consideration was passed at the special session of 1894. Among the various matters specified in the proclamation of the governor was the following: 'To provide to reduce the penalties and interest on delinquent taxes to one-half the present rates.' In this particular it is claimed that, inasmuch as the prior law provided for a penalty of ten per centum upon the amount of the delinquent tax, and the reduction was to forty cents per tract of land, the limit prescribed by the call of the governor was disregarded, and that therefore the act is unconstitutional. The supreme court of Colorado, upon a precisely similar attack upon a law passed at the same session, said:

" 'Legislative judgment and discretion as to transaction of the business specially named are certainly not

inhibited at special sessions. The legislature cannot go beyond the limits of the business specially named in the proclamation; . . . but within the limits of such business it may act freely, in whole or in part, or not at all, as may be deemed expedient, according to its own judgment. The legislature must do this much, or the right of legislating by the representatives of a free people at special session is destroyed, and all our ideas of such right are rendered obsolete. . . . '

"And in another case touching the validity of the act we are considering, the same court said: 'The general subject submitted for legislation by the executive is the reduction of the penalties and interest on delinquent taxes. The words following are to be treated as advisory merely. The subject having been particularly designated in the call, the extent to which legislation shall extend is primarly for legislative, and not for executive, determination.' *In re Amendments of Legislative Bills,* 19 Colo., 356, 35 Pac., 917.

"This interpretation by the supreme court of Colorado of provisions of the constitution of the State was given in answer to questions propounded by the house of representatives while the act was in process of legislative formulation, and such interpretation by the highest court of the State is binding upon this court. Moreover, it is, in our opinion, wholly consonant with good reason."

Brown v. *State,* 32 Tex. Cr. R., 119, 132, 22 S. W., 596, 601. We copy the following matter from the opinion, which fully states the controversy:

"It is contended that the act of the special session of the Twenty-Second Legislature organizing the twenty-first judicial district is unconstitutional, because the governor did not, in his proclamation convening said legislature, designate this particular matter in said proclamation as a 'subject' for legislation. Article 4, sec. 8, Const., provides that the governor 'may, on extraordinary occasions, convene the legislature at the seat of government (or at, etc.). . . . His proclamation shall state specifically the purpose for which the legislature is convened.' It is further provided by article 3, section 40, of said constitution: 'When the legislature shall be convened in special session, there shall be no legislation upon any subject other than those designated by the proclamation of the governor calling such session, or presented to them by the governor; and no such session shall be of longer duration than thirty days.' The proclamation, among other things, convened the legislature 'to reapportion the State into congressional, senatorial, judicial, and representative districts, and to provide for the election of officers therein.' The judicial districts mentioned in the proclamation were those presided over by the district judges. A casual inspection of the proclamation renders this certain. That the authority to reapportion or reorganize the judicial districts of the entire State necessarily carried with it the power to reapportion any given number of such districts is to our minds a self-evident proposition. The office of the proclamation is to designate the subjects, and not the manner or

extent of legislation on such subjects. 'It is not the intention to requre the governor to define with precision as to detail the subjects of legislation, but only in a general way by his call to confine the business to the particular subjects.' *Mitchell* v. *Turnpike Co.*, 3 Humph. [Tenn.], 456; *Devereaux* v. *City of Brownsville* [C. C.], 29 Fed., 742; *Baldwin* v. *State*, 21 Tex. App., 591, 3 S. W., 109. That the legislature may only enact legislation in part in relation to the subject mentioned in the call does not render such legislation invalid, nor is it necessary to the validity of such legislation that the whole subject-matter should be acted on by the legislature. The call includes the entire subject of reapportioning the judicial districts, and authorized 'any and all such legislation upon that subject as was deemed necessary by the legislature. It was not necessary, nor would it have been proper, for the governor, in his proclamation, to have suggested in detail the legislation desired. It was for the legislature to determine what the legislation should be.' ''

Stockard v. *Reid*. "The first proposition," said the court, "presented and urged in this court is that the court below erred in holding the act of the Thirtieth Legislature, passed at its special session, and approved May 14, 1907 [chapter 8], relating to the contest of local option elections valid, constitutional, and binding, for that said act is contrary to section 40, article 3, of the constitution of this State, because it relates to the contest of prohibition elections, and not to the procedure in a civil or criminal trial, and such legislation

was not designated in the proclamation of the governor convening said special session, nor presented by the governor in any message to the legislature. The act in question was passed at the special session of the legislature convened by the governor on the 13th of April, 1907. The first clause or paragraph of the proclamation relative to the purpose for which the special session was called is as follows: 'To enact adequate laws simplifying the procedure in both civil and criminal trials . . . and also upon the needed reforms in our jury system, I again call your attention to the importance of these reforms, both to the counties and State, and to the people who bear the burden of a system almost bewildering in its meshwork of technical absurdities. I cannot too strongly urge upon the legislature the necessity for the reforms demanded.' " The court here copied the clause from the constitution which is set forth in the excerpt from the preceding case, and held that the act was within the call of the governor, and not violative of the constitutional provision.

State v. *Shores.* Said the court:

"It is insisted the court erred in permitting the attorney for the State, against the objection of the prisoner, to strike two jurors from the panel of twenty qualified jurors, on the ground that the act of 1887 permitting it is unconstitutional. It is not claimed that it is unconstitutional because it denies the prisoner any right secured to him by the constitution, but because the act was passed at an extraordinary session of the

legislature, and it is claimed the subject was not embraced in the proclamation of the governor. The constitution provides that 'the governor may, on extraordinary occasions, convene at his own instance the legislature; but, when so convened, it shall enter upon no business except that stated in the proclamation by which it was called together.' Section 7, art. 7. The governor, under this authority, issued his proclamation convening the legislature in extra session on the third Wednesday in April, 1887, to consider and act upon the business stated in the proclamation, among other business, 'to protect the public treasury against unnecessary expenditures by regulating the costs, charges, and proceedings in criminal cases before justices of the peace and circuit courts.' Acts 1887 [Extra Sess.], p. 235. The legislature so convened on the 7th day of May, 1887, amended sections 1, 3, 4, and 8 of chapter 159 of the Code. The first clause of section 3 was amended so as to read: 'In case of felony twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forthwith summoned and selected, until a panel of twenty jurors free from exception be completed; from which panel the accused may strike off six jurors, and the prosecuting attorney may strike off two jurors,' etc. The section, by its terms, applies only to indictments for offenses committed after the act took effect. This act the governor approved, thus deciding for himself that it was embraced in the

subjects mentioned in the proclamation. Acts 1887 [Extra Sess.], ch. 6, p. 243.

"All the presumptions are in favor of the constitutionality of the act. If by any reasonable construction of the language of the proclamation the subject legislated upon in section 3 is embraced therein, the act is constitutional. If the direct tendency of this act is to lessen the expenses of criminal trials, and thus to any extent protect the public treasury against unnecessary expenditures, and no constitutional right of the citizen is abridged thereby, then the act is within the list of subjects embraced in the proclamation, and the act is constitutional, we cannot see how the act in any wise abridges the constitutional rights of the citizen. *State* v. *Davis*, 31 W. Va., 390. We judicially know that one great cause of expense in criminal trials is hung juries, and as a consequence new trials. The panel must contain twenty jurors free from legal exception. When all the challenges for cause have been made by both the State and prisoner, and the panel contains twenty jurors, there remain eight peremptory challenges for cause entirely within the breast of the challenger. He may strike off the number he is permitted by law to strike, without assigning any reason therefor.

"As the law formerly stood the prisoner alone was permitted to exercise the right of peremptory challenge. If he had a warm personal friend on the jury, who would be unconsciously prejudiced in his favor, of course he would be left on the jury, and so would all such, unless they were more than twelve. The prose-

cuting attorney might see two of the most intimate friends of the accused on the jury, men who he might have every reason to believe would refuse to render a verdict against the prisoner. He is powerless to prevent them remaining on the jury. He goes through the trial, and because these men were on the jury there is no verdict, and there must be another trial with all its attendant expense to the State. There can be no doubt that giving the prosecuting attorney a peremptory challenge of two jurors tends to prevent hung juries and mistrials, and to lessen the expense of criminal trials, and thus protect the public treasury. We see no objection to the act because it was passed at the extra session, and it is constitutional and valid."

Passing for the present our own case of *Mitchell* v. *Turnpike Co.*, 3 Humph., 458, we shall refer to certain cases from other jurisdictions cited by the attorney-general. The first of these is *Wells* v. *Missouri Pac. Ry. Co.*, 110 Mo., 286, 19 S. W., 530, 15 L. R. A., 847.

In that case it appeared that the governor, in his message calling the legislature into extraordinary session, made, by particular reference, certain parts of his biennial message of the same year a part of his special message; that is, the supreme court of Missouri, in deciding the question presented to it, said, in effect, it would so consider the special message.

The governor thus called attention to section 14 of article 12 of the constitution of 1875. This section was:

"Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared

public highways, and railroad companies common carriers. The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties."

Thus treating the biennial message as a part of the special message, the governor said: "I call your particular attention to the following sections of article 12 of our State constitution: . . . Section 14, which declares railways to be public highways, and the companies operating them common carriers; it also directs the general assembly to pass laws to correct abuses, and to prevent unjust discrimination and extortion, and to fix maximum rates of charges, and enforce all such laws by adequate penalties."

The legislature passed under this call the act of June 16, 1887 (Acts [Extra Sess.], 1887, p. 14), "to provide for the prevention of accidents to railroad employees and others, by requiring the switches, frogs and guard-rails to be properly blocked." By its first section it was declared that "all companies or corporations, lessees or other persons owning or operating any railroad or part of a railroad in this State, are hereby required, on or before the first day of November, 1887, to adopt and put in use the best known appliances or inventions to fill or block all switches, frogs and guard-

rails on their roads in all yards, divisional and terminal stations, and where trains are made up to prevent, as far as possible, the feet of employees or other persons from being caught therein." The second and last section declared in substance that, in suits for damages growing out of noncompliance with the first section, the contributory negligence of the injured party would not relieve the defendant from liability.

The supreme court of Missouri held that the act did not fall within the scope of section 14 of article 12 of the constitution, which was the special subject they were called to pass a law or laws upon. The court said that the words "to correct abuses" as employed in section 14 referred to abuses having some relation to the freight or passenger tariffs of railroads as public highways and common carriers; that no reasonable interpretation of the language of section 14 would suggest any constitutional command for legislation of the kind appearing in the act of June 16, 1887, above mentioned; that that act, imposing as it did a duty to block all switches, frogs, etc., not only upon railway companies, but upon all kinds of corporations "or other persons" owning any part of a railroad, would reach the case of every private citizen owning a small track for his own convenience, as well as the great railroad lines of Missouri; that the effect of the second section would be to introduce a radical innovation in procedure by the attempted elimination of contributory negligence as a defense by the way of penalty for the violation of the act in cases to which it might apply. The court said:

"It has no fair relevancy that we can discover to the subject of freight or passenger tariffs, or to abuses of corporate power by railways in the respects alluded to in section 14, article 12, of the constitution. We conclude that the act does not fall within the range of the subjects submitted to the assembly for action by the governor in his proclamation and messages." It was therefore held void.

The provisions of the constitution of Missouri concerning the limitation upon legislation passed under special call of the governor are as follows: "On extraordinary occasions he may convene the general assembly by proclamation, wherein he shall state specifically each matter concerning which the action of that body is deemed necessary." Const. 1875, art. 5, sec. 9. It was further declared by section 55 of the fourth article of the same instrument that "the general assembly shall have no power, when convened in extra session by the governor to act upon subjects other than those specially designated in the proclamation by which the session is called, or recommended by special message to its consideration by the governor, after it shall have been convened."

Jones v. *Theall*, 3 Nev. 233. The question in this case was not whether a specific act fell within the governor's call, since it was not mentioned therein, or in his special message to the legislature after it had convened, but whether under certain peculiar provisions of the constitution of that State it was automatically before that body as a part of the legislation

to be considered under the special call. It appears that, when a certain time has elapsed after the bill has been received by the governor, and the legislature adjourns while it is in his hands, he may state his objections in writing after the adjournment, and file the bill with his objections in the office of the secretary of State, whose duty it then becomes to lay this bill with the objections "before the legislature at its next session in like manner as if it had been returned by the governor, and if the same shall receive the vote of two-thirds of the members elected to each branch of the legislature upon a vote taken by yeas and nays to be entered upon the journals of each house, it shall become a law. The court said:

"To the special session of the legislature convened by the proclamation of the governor a few days after the adjournment of the general session, the secretary of State returned this bill, which was taken up and passed by a two-thirds' vote, and thus, it is claimed, became a law. Upon these facts, it is urged on behalf of the defendant that the legislature, at its special session, had no power to act on the bill, it not having been called to its attention by the governor, and therefore that it never became a law.

"Such is also our opinion, and we think it most clearly sustained both by the letter and spirit of the constitution. Whilst the scope within which the legislature may act during its general session is almost unlimited, it is restricted at its special session to the consideration of such business as may be specially called

to its attention. Section 9, art. 5, of the constitution prescribes the limits of its power at such session in the following language: 'The governor may on extraordinary occasions convene the legislature by proclamation, and shall state to both houses when organized, the purpose for which they have been convened, and the legislature shall transact no legislative business except that for which they were especially convened, or such other legislative business as the governor may call to the attention of the legislature while in session.'

"There is certainly no ambiguity in this language, and, unless we adopt the saying of Talleyrand—that words are given to conceal ideas—there can be no difficulty in ascertaining the object sought to be accomplished by this section of the constitution. The powers of the legislature at its special sessions are expressly and clearly limited to the transaction of the business for which it may be convened, or such other business as the executive may call to its attention while it is in session. If the legislature can break through this limit for one purpose, it may for all purposes, and enter upon general legislation. If it may take up a vetoed bill to which its attention is not directed by the governor, it may frame and pass an entirely new bill upon a subject not referred to in any executive message. It is either strictly limited to such special subjects as may be called to its attention or it is not limited at all. There is no mean between these extremes which can be adopted without a clear departure from the letter of

the constitution. Let it be borne in mind that it is only upon extraordinary occasions that a special session is authorized to be called; such being the same, it is fair to presume that it was the intention to allow none but urgent business, and such as would admit of no delay, to be transacted at such a session. That ordinary legislative business should not be transacted at a session which can properly be convened only upon some extraordinary occasion, or when some great emergency makes it necessary, is so manifestly proper, and the transaction of such business would seem to be so manifestly improper, that we are confirmed in the opinion that it is the purpose of the constitution to forbid consideration of any but such business as the governor may deem necessary to be transacted at such sessions; but a reconsideration of all bills vetoed and filed by the governor in the office of the secretary of State after the adjournment of the general session is not necessarily business of such urgent importance as to make a special session necessary, or such as to justify the attention of the legislature if so convened. Such bills might possibly be of the most trivial character. At least, if it were deemed important to have them reconsidered, it is the province of the executive to ask legislative action upon them. . . . What is meant by the words 'such other legislative business as the governor may call to the attention of the legislature while in session?' Clearly such business as the governor may deem it necessary for the legislature to transact, and upon which he may solicit action—the business

for which the special session is convened, or such other business as may be called to the attention of that body by some message coming from the governor during the session, and upon which he may ask legislative action. Many subjects may incidentally be referred to in the executive messages upon which no action whatever is required; but it will hardly be claimed that such incidental reference would authorize legislation upon all such subjects at a special session. The evident object, it seems to us, is to restrict legislation at such session to those subjects which the governor may deem it necessary to legislate upon. If such be not the object, why was any restriction whatever placed upon the legislature at its special sessions, or any control over its power given to the executive? If we are correct in the construction which we place upon section 9, above referred to, it cannot be said that the governor's objections to a bill filed with the secretary of State before the convention of the special session is such a calling of attention to the bill as to justify its consideration at such session. We are satisfied that the legislature, at a special session, can only legislate upon such subjects as are specially called to its attention by the governor, with a view to secure legislative action thereon."

We shall now proceed to state the substance of our own case of *Mitchell* v. *Turnpike Company*.

In 1836, as stated in the opinion, at a called session of the legislature (chapter 4, sec. 2) it was provided that the commissioners of any railroad, or turnpike

company, might make a survey, or resurvey, as far as to locate routes or make such changes as they might deem to the interest of said companies. By authority of this provision the commissioners relocated the Franklin & Columbia Turnpike Company's road so as to make it run over Mitchell's farm. Damages were assessed to him in the manner customary at that time; but, desiring to escape the burden of the road altogether, he attacked the act providing for the relocation on the ground that it was unconstitutional. We now quote from the opinion what is said upon the subject:

"The alleged unconstitutionality of this provision is not supposed to arise from the character of the provision itself, or the nature of the subject, for the constitution, article 11, section 9, declares that a 'well-regulated system of internal improvement is calculated to develop the resources of the State, and promote the happiness and prosperity of her citizens, therefore it ought to be encouraged by the general assembly.' But it is supposed to arise from the limited powers of the legislature at a called session; their commission at such time to legislate, so to speak, depending upon the scope and extent of the governor's message, to be laid before them. Article 3, section 9, of the constitution provides that the governor 'may, on extraordinary occasions, convene the general assembly by proclamation, and shall state to them, when assembled, the purposes for which they shall have been convened, but they shall enter on no legislative business, except that for which they were especially called to-

gether.' This undoubtedly is a very salutary provision, tending somewhat to check overlegislation, and to render laws a little more stable, by furnishing a period of two years during which they may be in some degree subjected to the test of a brief experiment. And cases may sometimes arise, it is to be sincerely hoped but seldom, in which it may become the duty of the court to declare a law passed under such circumstances beyond the scope of the legislative commission arising out of this provision of the constitution. Our present inquiry is whether this be one of such cases. The message of Newton Cannon, Governor of the State at the time in question, calls the attention of the legislature to the survey of a route through the State for the contemplated Louisville, Cincinnati & Charleston Railroad, to the omission of a county in a late electoral law, to the disputed boundary with the State of Mississippi, to the treaty with the Cherokee Nation, to compensation of volunteer militia called into service under the requisition of the President of the United States, and finally to the act of congress entitled 'An act to regulate the deposits of the public money,' a copy of which was transmitted to them, and with respect to which the governor remarked that it presented another subject demanding legislative action during that session, and he adds that the reception and judicious investment of such sum or sums of money as may from time to time be appropriated to our State under the provisions of the said act must be regarded by all as a matter of paramount importance, and that he had the 'fullest

confidence that they would devote to it the most mature consideration.'

"He adds, with regard to the acts of congress, . . . that its happy influence in stimulating us to increased and vigorous exertions in the prosecution of our system of education and internal improvement must be extensively beneficial to the whole community.' At that time by the pre-existing laws the State was intersted to the extent of one-third in all the turnpike companies, and we cannot say that the resurvey or change in the location of the routes of such public improvements would not constitute a step, and a very material step, to the judicious investment of the fund alluded to.

"We cannot say, in view of the message, that it was not competent for the legislature 'to enter upon the business' thus submitted to their consideration, or that the provision in question is so remotely connected with that matter or 'business' as not properly to spring out of the general subject.

"The governor or executive, with us, is in no degree, or in any sense, a part of the legislature, and has not even at a called session the initiation of bills. At such session, when he submits a general subject, and the legislature 'enter upon the business' of legislating upon it, it will be found a difficult and invidious task to secure the character and details of their provisions so as to determine them of too remote affinity with the message from which they arise. In this case it is not necessary."

We have thus set out the cases very fully, with a view to more conveniently examining and comparing them, and deducing conclusions from them. The illustrative facts in each enable us better to apply the principles announced.

Comparing these cases we see no substantial difference in the constitutional limitations upon legislative power. They all provide that the governor may confine the legislature, called in special session, to such subjects of legislation as he may prescribe, which limitations he may make operative, in some by his proclamation alone, in others by a special message or messages after the body is convened, in others still by both means. All the cases agree that, while the governor may so limit the subjects of legislation, he cannot dictate to the legislature the special legislation which they shall enact on those subjects. In all of them the inquiry is finally reduced to the ascertainment of the subject or subjects embraced in the call, or message, determined by an analysis and construction of that paper as in the case of any other written instrument, and by a like analysis and construction of the legislation drawn in question for the purpose of deciding whether it is embraced within the call, or message. It is agreed, so far as any of the cases speak on the matter, and this view is undoubtedly sound, that the presumption is always in favor of the constitutionality of an act, and that any piece of legislation so under consideration should be held within the call, if it can be done by any reasonable construction. To these principles we

agree, and we now proceed to examine Governor Hooper's call to ascertain the subjects of legislation thereby proposed. For convenience we reproduce so much of it at this point as we think necessary to facilitate the construction.

The legislature, then, was called "to make such appropriations of the public moneys as may be deemed necessary and proper to maintain the State's institutions, offices, and departments."

The general subject or purpose was "to make appropriations . . . to maintain the State's institutions, officers, and departments." It was not to make appropriations in general to promote the welfare of the State, but to make appropriations limited to the maintenance of the State's institutions, offices, and departments; the power to make such appropriations being reposed in the legislature, and the duty imposed on them by the same instrument. The call, then, was to the discharge of a duty of the legislature imposed by the constitution, if not in terms, still by necessary implication. Within the limits of this subject or purpose mentioned the legislature had power to enact any laws they might deem proper, any laws which would be germane to such maintenance, or which would have a reasonably direct bearing thereon, and the governor could not in any manner confine that power. But the governor has power, under the constitution, to limit the subjects which they may consider, and in order to do this he may define the subject so as to make it broad or narrow, according to his conception of his

public duty. He cannot, under the guise of a definition, impose his will upon the legislature as to the laws they shall pass, as it seems was attempted in the Colorado cases. But, we repeat, he can by *bona fide* definition limit the subject to be legislated on so as to make that subject either broad or narrow. This narrowing by definition is accomplished, as in all other matters under the dominion of the laws of thought and the laws of expression in human language, by the imposition of qualifying matter upon a general subject. Just as the general subject "animal" may by the addition of qualifying limitations be reduced to the concept, man, and this down further to some special race, or class, or group of men. Each one of these would in its turn be truly a subject of thought, and concerning which propositions might be affirmed, or laws enacted. So here it was within the power of the governor by definition, or the imposition or addition of qualifying matter, to reduce the general subject of appropriations down to, or restrict them to, those for the maintenance of the institutions, offices, and departments of the State for the ensuing two years from March 19, 1913. He could not fix the amount, or impose any terms as to the method or means of such maintenance. This would be a matter for the legislature only. But this last observation must be restricted to the relations between the governor and the lawmaking body. The officers of the State upon whom is imposed the duty of disbursing the funds of the State have the right to have submitted to the courts the question whether the

appropriation has been constitutionally made. The courts in determining this question will inquire whether the legislative act passed at a special session was within the governor's call. But in the effort to reach a conclusion on this subject the courts will, as already said, give a liberal construction with a view to upholding the act if it can be reasonably done. They will adopt a construction, even though not the most obvious, if that construction is still a reasonable one, and will sustain the legislation. The same observation is true of the governor's call as one of the necessary conditions of the legislation.

Now, in this view, what meaning should be ascribed to the word "maintain?" The most obvious is, of course, direct support. Another meaning somewhat more remote is to aid. This may be given, and is best given, usually, by direct appropriation. But it may also be given, as the writer thinks, by holding up the hands of those who are doing the same work, that is, work which the special department of the State government was created to do. It is in this view, he thinks, that the constitution authorizes the legislature to exempt certain charitable institutions from taxation, which exemption is an indirect largesse. These institutions do work in helping the indigent and unfortunate people of the State, which relieves the State of the direct burden. So, according to the description given of the complainant's work, it was most largely and efficiently assisting in the work for which the agricultural department was designed. It was not inap-

propriate, therefore, as the writer believes, that the State should endeavor to help forward the work of that department by making the appropriation in behalf of so able a coadjutor. By placing the appropriation under the head of the agricultural department, the legislature showed, as it seems to the writer, that it understood it was thereby assisting and, albeit indirectly, maintaining that department. It goes without saying that such an appropriation was for a public purpose, and that money could not be appropriated for any other purpose. And there is no doubt such an appropriation, as the writer understands, might have been made by a bill at any general session, since it was for such public purpose. This special phase of the question was settled in the case of *Shelby County* v. *Exposition Co.*, 96 Tenn., 660, 36 S. W., 694, 33 L. R. A., 717.

The majority of the court, however, while thoroughly approving the principles announced, are of the opinion that the writer has given to them an application which they do not support. The majority are of the opinion that the word "maintain" as used in the governor's call meant, if not direct maintenance by an appropriation to the agricultural department to be received and used by it, at least one under its own direction and control, and that it was not susceptible of any other or additional meaning, and that its intent could not find true expression in an appropriation to a separate institution or corporation to be expended by such separate institution or corporation, although

such separate organization might be engaged in whole or in part in doing work for which the department was organized. The majority believe that the call was to appropriate money to the support of the department itself, and not in any sense to aid some other in doing work of the same kind.

It results that the decree of the chancellor must be reversed, and the bill dismissed, at relator's costs.

NEIL, C. J., dissenting.

JONES *v.* STATE.

(*Knoxville.* September Term, 1913.)

1. **HOMICIDE. Issues. Second degree murder.**

In view of Shannon's Code, sec. 6441, requiring the jury to ascertain in their verdict whether the offense is murder in the first or second degree, it was error, on trial of an indictment for murder, for the court not to instruct on second degree murder. (*Post*, *pp.* 494, 495.)

Code cited and construed: Secs. 6438, 6439, 6440, 6441 (S).

Cases cited and approved: Good v. State, 69 Tenn., 293, 294; State v. Hargrove, 81 Tenn., 178; State v. Parker, 81 Tenn., 221; Palmer v. State, 121 Tenn., 465, 488; Frazier v. State, 117 Tenn., 430; Powers v. State, 117 Tenn., 363.

2. **HOMICIDE. Instructions. Degrees of crime.**

It is the better practice to charge upon all of the offenses embraced in the indictment, since failure to do so will be reversible if there is any doubt that accused was prejudiced by such omission. (*Post*, *p.* 495.)

3. **HOMICIDE. Appeal. Harmless error. Failure to instruct.**

Failure to instruct on second degree murder so that the jury could ascertain in its verdict whether the offense was first or second degree murder, pursuant to Shannon's Code, sec. 6441, was reversible error, notwithstanding Pub. Acts 1911, ch. 32, providing that no judgment shall be set aside for error in the charge, etc., unless it affirmatively appears that it affected the result. (*Post*, *p.* 496.)

Acts cited and construed: Acts 1911, ch. 32.

4. **CRIMINAL LAW. Appeal. Waiver of error.**

The fact that counsel both for the State and for accused took the position that he was guilty of first degree murder or entitled to acquittal on the ground of self-defense would not operate as

a waiver of accused's right to have the question of second degree murder submitted. (*Post*, *p.* 496.)

FROM KNOX.

Appeal from Criminal Court, Knox County.—T. A. R. NELSON, Judge.

J. A. ATCHLEY, E. F. WALSH, and GORDON MYNATT, for appellant.

W. W. FAW, Assistant Attorney-General, and W. T. KENNERLY, for the State.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error was indicted and convicted in the criminal court of Knox county for the murder of Samuel C. Hickey on the morning of June 1, 1913. He was sentenced to death and has appealed to this court. Numerous errors are assigned by his counsel, but we need consider only one.

The assignment referred to is in substance that the trial judge charged the jury only on the subject of murder in the first degree, and self-defense, and matters relating thereto, and fail to instruct them on the crime of murder in the second degree. This was reversible error. The sections of our Code bearing on the subject are as follows:

"6438. If any person of sound memory and discretion, unlawfully kill any reasonable creature in being, and under the peace of the State, with malice, aforethought, either express or implied, such person shall be guilty of murder.

"6439. Every murder perpetrated by means of poison, lying in wait, or by an other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any arson, rape robbery, burglary, or larceny, is murder in the first degree.

"6440. All other kinds of murder shall be deemed murder in the second degree.

"6441. The jury before whom the offender is tried, shall ascertain in their verdict whether it is murder in the first or second degree; and if the accused confess his guilt, the court shall proceed to determine the degree of crime by the verdict of a jury, upon the examination of testimony, and give sentence accordingly."

Manifestly it was impossible for the jury to perform the duty imposed upon them in the section last quoted, when the trial court failed to submit to them the question whether the prisoner's crime fell within the description of murder in the second degree. His failure to charge upon this subject was equvalent to a specific instruction that plaintiff in error was guilty of murder in the first degree, or entitled to an acquittal under his plea of self defense. He thus withdrew from the jury a question which the Code specifically required should be submitted to them. The difference

was vital, since the punishment for murder in the first degree is death, while that for murder in the second degree is imprisonment in the penitentiary from ten to twenty years.

It was said in *Good* v. *State*, 1 Lea (69 Tenn.), 293, 294:

"When it is clear that the grade of offense charged is proved, and there is no room for doubt as between it and a lesser grade embraced by statute in the higher, and of course included in the indictment, to charge the law pertaining to such lesser grades would simply tend to confuse and mislead the jury and often result in verdicts inadequate to the crime actually committed. In applying the rule of this opinion, courts will of necessity act which circumspect caution, giving to the accused the full benefit of all the rules of law applicable to the facts developed in the trial of his cause.

"When the offense charged is beyond controversy made out and is complete, it is the duty of the court to confine its charge to such case; and so, if the offense must be the one charged or no offense in law, as frequently happens, the charge should be so restricted that the jury may be enabled to decide intelligently the single question presented and not be mystified by abstractions."

This case was followed and approved in the following subsequent case: *State* v. *Hargrove*, 13 Lea (81 Tenn.), 178; *State* v. *Parker*, Id., 221; *Palmer* v. *State*, 121 Tenn., 465, 488, 118 S. W., 1022; *Frazier* v. *State*, 117 Tenn., 430, 439-441, 100 S. W., 94; *Powers* v. *State*,

117 Tenn., 363, 372, 97 S. W., 815. Of these, three were murder cases, but in none of the murder cases was there a failure to charge upon the crime of murder in the second degree as well as murder in the first degree. In *State* v. *Hargrove* and *Frazier* v. *State*, the error assigned was the failure to charge on the subject of manslaughter; in *Powers* v. *State*, the failure to charge the law applicable to involuntary manslaughter, assault and battery, and simple assault. Of the other cases, *Good* v. *State* involved a prosecution for robbery; *State* v. *Parker* for assault and battery; *Palmer* v. *State* a conviction for rape. The special question now before us, arising under Code, section 6441, could not therefore have arisen in these last-mentioned cases.

It follows therefore that, in every murder case wherein the crime of murder in the first degree is involved or embraced in the indictment, the trial judge must charge on both murder in the first degree and murder in the second degree. To lower grades of homicide and to all other kinds of crime, the rule laid down in *Good* v. *State* applies, but we deem it proper to repeat the caution offered in *Frazier* v. *State*, supra, as follows:

"The better practice to be pursued by trial judges undoubtedly is for them to charge upon all offenses embraced in the indictment, because whenever there is any doubt that the defendant has been prejudiced by such omission it will be error, for which it will be the duty

of this court to reverse the judgment and remand the case for a new trial.

"It is only in cases where it is absolutely certain that the omission was not prejudicial to the defendant, in the trial court, that a charge omitting instructions upon every offense contained in the indictment can be sustained."

The court added that it was only because of "such absolute certainty" that the assignment was overruled in that case.

Chapter 32, Acts of 1911, cannot reach the vital error committed in the case before us.

It is proper to state that the bill of exceptions in the present case sets forth the fact that, in their addresses to the jury, both counsel for the State and for the prisoner took the position and argued that the prisoner was either guilty of murder in the first degree or entitled to an acquittal on his plea of self-defense. This fact cannot alter the legal result we have announced. It could not be treated as a waiver of the prisoner's right to have the case submitted to the jury in the manner prescribed by statute.

For the error indicated, the judgment must be reversed, and the cause remanded to the criminal court of Knox county for a new trial.

SHIPP *v.* STATE.

(*Knoxville.* September Term, 1913.)

1. **HOMICIDE. Trial. Direction of verdict.**

In a prosecution for homicide, where accused pleaded not guilty, though he admitted the firing of the fatal shot, claiming that it was caused by his nervousness, and that he was only attempting to rob deceased, it is reversible error for the court to charge that the only question for the jury to determine was whether accused was guilty of murder in the first degree with mitigating circumstances, for Shannon's Code, sec. 6441, declares that the jury before whom an offender is tried shall ascertain whether it is murder in the first or second degree, and if accused confess his guilt, the court shall determine the degree of crime by the verdict of a jury, and the court, not having the power to set aside the verdict of a jury, cannot, as it practically did in this case, direct a verdict of guilty or pass on any question of fact. (*Post*, *p.* 503.)

Code cited and construed: Sec. 6441 (S).

Cases cited and approved: Huffman v. State, 29 Ala., 40; State v. Wilson, 62 Kan., 621; State v. Godwin, 145 N. C., 461.

2. **CRIMINAL LAW. Trial. Direction of verdict.**

In a prosecution for felony, where a plea of not guilty is interposed, the court can neither direct a verdict of guilty nor can it pass on any question of fact unfavorable to accused. (*Post*, *p.* 504.)

FROM HAMILTON.

Appeal from Criminal Court, Hamilton County.—S. D. McREYNOLDS, Judge.

W. L. Frierson, for appellant.

W. W. Faw, Assistant Attorney-General, for the State.

Mr. Justice Williams delivered the opinion of the Court.

In this case there was a conviction of the plaintiff in error of the crime of murder in the first degree for the killing of one Bedell; the sentence being one for his execution. He has appealed and assigned as error that the trial judge charged the jury as follows, notwithstanding he stood at the time on a plea of not guilty:

"The defendant makes no denial of this occurrence, but states on the stand that he did commit this murder, but insists that he was raised up around Bedell's place, that he never had any education, and that he was raised up under Bedell's tutelage to some extent. And from these facts his attorney, in argument, requests the jury to find the defendant guilty of murder in the first degree with mitigating circumstances. From this admission of defendant and his counsel, the only thing left for you, gentlemen of the jury, is to determine whether or not you will recommend mercy in your verdict, and this is a matter for you to determine and report. If you find the defendant guilty of murder in the first degree, without more, under the law he will have to suffer death. If you find him guilty of murder in the first degree, with mitigating circum-

stances, and so report, then it is a question for the court to determine as to whether he shall be sentenced for life or sentenced to death under the law."

The reference in the charge is to the testimony of plaintiff in error to the effect that he did kill Bedell, not that in so doing he committed murder in the first degree; that he and one Dodson had planned to rob Bedell and laid in wait in the darkness for deceased to leave his store to go to his residence; that plaintiff in error did not start out or design to shoot Bedell but intended to hold up deceased and rob him. "Q. Now, how came it that he was shot? A. I don't know. Scared—nervous, I reckon—and pulled the gun off, I reckon. I didn't intend to."

The charge from which the above excerpt is made contained the usual instructions in respect to the different degrees of homicide, the presumption of innocence, reasonable doubt, and weight of evidence.

The argument of counsel of the accused for error is that the portion of the charge of the trial judge quoted was tantamount to giving peremptory instructions to the jury to find plaintiff in error guilty of murder in the first degree and was an invasion of the province of the jury as well as a denial of trial by jury guaranteed by the constitution.

It will be noted that the trial judge told the jury that, in view of the admissions made, the only thing left for the jury to do was to determine whether or not extenuating circumstances existed. The jurors could have drawn no conclusion from this other than

that they were under instruction to proceed upon the basis of murder in the first degree being fixed on the accused, so far as they were to make return.

This was error. Whatever may be the rule in relation to misdemeanors, the weight of authority is overwhelming to the effect that in prosecution for felony, where a plea of not guilty is interposed, it is not permissible for the court to direct a verdict of guilty or to pass on any question of fact unfavorable to the defendant. This is true even though the incriminating evidence is uncontradicted or conclusive. *Huffman* v. *State*, 29 Ala., 40; *State* v. *Wilson*, 62 Kan., 621, 64 Pac., 23, 52 L. R. A., 679; *State* v. *Godwin*, 145 N. C., 461, 59 S. E., 132, 122 Am. St. Rep., 467; *Konda* v. *U. S.*, 166 Fed., 91, 92 C. C. A., 75, 22 L. R. A. (N. S.), 304, and note.

In the last cited case, Baker, Cir. J., said: "In our judgment, however, a defendant in a criminal case has the absolute right to require that the jury decide whether or not the evidence sustains each and every material allegation of the indictment. . . . In a civil case, the judge may exercise the power of directing a verdict for the plaintiff when there is no conflict in the evidence and the only inference that may be drawn by reasonable minds as to the ultimate facts in issue favors the plaintiff. This power, we opine, grew out of the practical administration of the fundamental power to review, on a motion for a new trial, the findings of the jury. . . . But in a criminal case, if the jury returns a verdict for the defendant, the judge, no

matter how contrary to the evidence he may think the verdict is, cannot set it aside and order a new trial. Therefore, since the judge is without power to review and overturn a verdict of not guilty, there is no basis on which to claim the power to direct a verdict of guilty. Our conclusion is that an accused person has the same right to have twelve laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting. Inasmuch as jurors are rightly trusted, in close and difficult cases, to maintain the peace and dignity of organized society, surely they may be relied on in the plain and simple ones."

In this State we have a statute (Shannon's Code, sec. 6441) providing, in reference to trials for murder, as follows: "The jury before whom the offender is tried, shall ascertain in their verdict whether it is murder in the first or second degree; and if the accused confess his guilt, the court shall proceed to determine the degree of crime by the verdict of a jury, upon the examination of testimony, and give sentence accordingly."

If on a plea of guilty the jurors are by statute made the determiners of the degree of such an accused's guilt, *a fortiori* the trial judge cannot be permitted to exercise that function and instruct as in this case, where the accused had pleaded not guilty.

Further, plaintiff in error testified that the shooting and killing was not intentional, but were attributa-

ble to his nervousness in carrying out the real design to rob. Whatever of weight or lack of weight this testimony carried was a matter for the jury, to be considered when, under the statute quoted, it came to ascertain by verdict whether the crime was murder in the first or second degree. This phase of the statute is treated of in an opinion by the chief justice at this term in the case of *Jones* v. *State*, 161 S. W., 1016, and need not be here further discussed. Plaintiff in error was entitled to have the jury determine whether his guilt was that of murder in the second degree. Reversed and remanded.

ADAMS *et al. v.* CHATTANOOGA CO., *Limited.*

(*Knoxville.* September Term, 1913.)

1. **CORPORATIONS. Foreign corporations. Licensing of foreign corporations.**

A foreign corporation doing business in the State under foreign corporation statutes (Acts 1877, ch. 31; Acts 1891, ch. 122; Acts 1895, ch. 81), requiring the filing of the charter with the secretary of State and the procurement of a license, is not a new entity, distinct from the foreign organization, and is domestic only as to property and acts within the jurisdiction. (*Post*, *p.* 515.)

Acts cited and construed: Acts 1877, ch. 31; Acts 1891, ch. 122; Acts 1895, ch. 81.

Cases cited and construed: Coke & Coal Co. v. Steel Co., 123 Tenn., 428, 442; Ohio & Miss. R. Co. v. Wheeler (Ind.), 297; Young v. Iron Co., 85 Tenn., 189; Grangers' Life Ins. Co. v. Kemper, 73 Ala., 325; Memphis, etc., R. Co. v. Alabama, 107 U. S., 581; St. Louis R. Co. v. James, 161 U. S., 545; Southern R. Co. v. Allison, 190 U. S., 326; Blake v. McClung, 172 U. S., 239; Blake v. McClung, 176 U. S., 60; McClung v. Embreerville Co., 103 Tenn., 399; Sully v. American Nat. Bank, 178 U. S., 289.

2. **EQUITY. Pleading. Practice.**

Every reasonable presumption should be exercised in favor of a bill when assailed by demurrer. (*Post*, *p.* 519.)

Cases cited and approved: Edwards v. Schillinger, 245 Ill., 231; Clark v. Mutual, etc., Assn., 14 App. D. C., 154; State v. North American, etc., Co., 106 La., 632; Williston v. Mich., etc., R. Co., 13 Allen (Mass.), 400; Smith v. Mutual, etc., Co., 14 Allen (Mass.), 336.

Cases cited and disapproved: Smith v. St. Louis, etc., Ins. Co., 3 Tenn Ch., 502; Smith v. St. Louis, etc., Ins. Co., 74 Tenn., 664.

3. **CORPORATIONS. Foreign corporations. Dissolution. Jurisdiction of courts.**

A court of chancery will not dissolve a foreign corporation domesticated in the State, where all of its assets are in a foreign jurisdiction, regardless of its authority to act, for its decree would be unenforceable. (*Post*, *p.* 520.)

4. **CORPORATIONS. Dissolution. Foreign corporations.**

Shannon's Code, secs. 5187, 6103, 6104, respectively declaring that a corporation is not dissolved by the nonuser or assignment of its powers and franchises, unless all its property has been appropriated to the payment of its debts, and any creditor or stockholder may file a bill to attach the corporate property, and have it applied to the payment of debts, and to have any surplus divided among the stockholders, and that in such cases the court may appoint a receiver, and take an account of the affairs of the corporation, and satisfy the debts, and divide the surplus, if any, apply not only to domestic corporations but to foreign corporations, and under them a court of chancery may dissolve a foreign corporation as to its property within the jurisdiction. (*Post*, *p.* 522.)

Code cited and construed: Secs. 3431, 4294, 4295 (T. & S. and 1858); Secs. 5187, 6103, 6104 (S.).

Case cited and approved: O'Connor v. Knoxville Hotel Co., 93 Tenn., 708.

5. **CORPORATIONS. Dissolution. Right to dissolve.**

Complainants and others joined in forming a British corporation, chartered to acquire land and the stock of any companies owning land or doing business in Tennessee, to take or otherwise acquire stock in any company engaged in business which it was authorized to carry on, and to sell, hold, reissue, or otherwise deal with such stock and securities. The British corporation, which was formed to take over large tracts of land in Tennessee, did not develop them, but sold them to other corporations, receiving the shares of those companies in part payment. *Held* that, as it was not insolvent, and as the holding of such stocks

was within its charter powers, complainant stockholders were not entitled to dissolution, under Shannon's Code, sec. 5187, declaring that a corporation is not dissolved by the nonuser or assignment in whole or in part of its powers, franchises, and privileges, unless all of the corporate property has been appropriated to the payment of debts. (*Post*, *pp.* 522, 523.)

6. CERTIORARI. Review. Moot cases.

In a suit to dissolve a corporation and distribute its assets, where the preferred stockholders were not before the court, it is improper for the court to construe the charter in relation to the rights of the preferred and common stockholders; that being a moot question not presented by the record. (*Post*, *p.* 524.)

Cases cited and approved: Kimball v. Kimball, 174 U. S., 158; Taylor v. Insurance Co., 97 Va., 60.

FROM HAMILTON

Appeal from the Chancery Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—M. M. ALLISON, Special Chancellor.

T. D. YOUNG and COLEMAN & FRIERSON, for plaintiff.

THOMAS & THOMAS, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint in this cause was filed by complainant Adams and others, as the owners of about 8,000 shares of a total issue of 60,000 shares of the common or ordinary shares of the Chattanooga Com-

pany, Limited, against that company, two other corporations as vendees of that company, and the Chattanooga Savings Bank. A demurrer filed to it was sustained by the chancellor. The bill is lengthy and somewhat involved, and it is more than ordinarily difficult to succinctly state the contents, due in large measure to the fact that general allegations in the body of the bill are in several instances modified or refuted by more detailed recitals of corporate records exhibited with the bill and prayed to be treated as parts thereof.

So far as material to the disposition of the errors assigned in this court, the bill may be said to contain allegations as follows:

Complainants were formerly holders of blocks of the preferred stock of the Chattanooga Land, Coal, Iron & Railway Company, predecessor of the defendant Chattanooga Company, Limited. The predecessor company issued $1,300,000 of mortgage bonds, upon which it defaulted. The bonds were held by residents of Great Britain. Pending a sale in foreclosure, the bondholders and the holders of the preferred stock entered into a reorganization agreement, by the terms of which it was stipulated that a new corporation should be organized, under the laws of Great Britain, to acquire the mortgaged estates at such sale, the capital stock of the new corporation to be issued in two classes: 12,000 of six per cent. preferred shares of twenty-five shares each, and 60,000 common shares of five each, the preferred shares to go to the bondholders, and the

common shares to go to the preferred stockholders, of the insolvent company—complainants and others. It was recited in the reorganization agreement that "the condition of preference is that the preferred shares shall receive principal and interest at six per cent. before anything is paid upon common shares, and that the preferred shares shall thereafter rank as common shares."

The Chattanooga Company, Limited, accordingly was organized and acquired the mortgaged estates, and its capital stock was so distributed. After holding the properties for about nineteen years (during which practically nothing was done towards developing its lands for profit), defendant company sold and conveyed 12,000 acres of its holdings to defendant Durham Coal & Iron Company, receiving as consideration $120,000 in cash, $300,000 in the seven per cent. preferred stock, and $150,000 in the common stock of this vendee corporation. The entire remaining realty of the company, 8,000 acres was conveyed to the defendant Chattanooga Estates Company in consideration of $200,000 in cash, $1,000,000 in the preferred stock, and $1,300,000 in the common stock of this vendee corporation; the total consideration received in the two transactions being $3,000,000 in cash and stocks.

The charter of the Chattanooga Company, Limited, was prepared by or at the instance of the preferred stockholders in Great Britain, and provided for the lodgment of the voting power in the preferred stock until that stock was, by payments made, reduced to the

level of the common stock. A copy of the British charter was filed and registered in the State of Tennessee in compliance with our foreign corporation laws, and thereby the corporation became domesticated in this State, and it is by complainants alleged, became a distinct corporation in, and under the laws of this State.

As to the *locus* of the assets of the company: It is alleged that the Chattanooga Company, Limited, has "no property or assets in England or elsewhere, saving and excepting the lands in Hamilton county, Tennessee;" that the defendant Chattanooga Savings Bank, located in Hamilton county, "has for a long time been, and is now, the financial agent and depository of the company, and, as such, now has in its possession a large amount of cash notes, accounts, and various stocks and bonds belonging to said defendant company," which the bill seeks to impound; that "said cash proceeds from the sale of said lands have been unlawfully distributed *pro rata* among the preferred stockholders" as interest on their shares of stock.

Touching the place or places where the company's business was transacted: The city of Chattanooga "was the place of the principal office and business headquarters of said company in the state of Tennessee, where it kept its books, conducted all its business transactions, and kept and used its corporate seal." The principal officers and directors all lived in Great Britain, where corporate meetings were held.

The charter of the Chattanooga Company, Limited—memorandum and articles of association under the

Companies Acts of Parliament 1862 to 1890—provided that the objects of the company were, among others:

To purchase and otherwise acquire land and other properties in America and the capital or other stocks of any companies owning property or doing business in Tennessee.

To enter into and carry into effect, as the company may determine, any agreements for the purchase or acquisition of the properties or stocks so acquired.

To take or otherwise acquire stock, shares, and securities of any company carrying on, engaged in, or about to carry on or engage in any business or transaction which this company is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to sell, hold, reissue, or otherwise deal with such stock, shares and securities.

To sell the undertaking of the company, or any part thereof, for such consideration as the company may think fit, and, in particular, for shares, debentures, or securities of any other company having objects altogether, or in part, similar to those of this company.

To issue preference shares and ordinary shares, and to attach to said preference shares and ordinary shares such preferential, deferred, or special rights, privileges, or conditions as may be determined by, or in accordance with, regulations of the company.

The bill charges in general terms that the Chattanooga Company, Limited, is insolvent; but its exhibits show in detail that the company is solvent, and

its solvency was properly assumed by the solicitors of the complainants in their arguments in this court.

It is alleged that the company, upon the sale of said lands to the purchasing companies, "ceased to do any business, to use its franchises, or to be a going concern;" but this is refuted by the corporate records exhibited, which show that the company was, in the exercise of its British franchises, proceeding to the transaction of business in course claimed by it to be regular. That business was being transacted in Great Britain by the company, complainants elsewhere in their bill allege.

It is charged that the directors purpose to hold the proceeds of the land sales, particularly the stocks of the vendee corporations, in the treasury, and not to distribute to the shareholders; that they further purpose arbitrarily and unjustly to favor the preferred shareholders in so doing, in this, that the six per cent., stipulated to be paid on the preferred stock, may accumulate thereon until in the end all claim of the common shareholders in the purchase-money fund is wiped out. It is further charged that the said fund is in no sense "earnings," and that only earnings may be applied, lawfully, in payment of interest on the preferred stock; that the payment so made out of the cash consideration sums is a diversion; and that any payments out of capital (such as the consideration cash and stocks) must be made to all shareholders *pro rata,* without preference as between the two classes.

Complainants sue in behalf of all creditors and stockholders, and the prayer of the bill is that it be sustained as a general creditors' bill for impoundment of the assets, including the consideration stocks, for a receiver to take charge of the property, that an account be taken to ascertain the rights of creditors and stockholders, and for general relief.

The bill of complaint was demurred to on grounds to be later indicated rather than formally stated; the demurrer was sustained by the chancellor, whose decree was affirmed by the court of civil appeals. The cause is before this court on writ of *certiorari*.

The errors assigned by complainants are two in number.

1. The court of civil appeals was in error in holding that the courts of Tennessee have no jurisdiction to wind up the affairs of the defendant company, at the instance of stockholders, because it has been domesticated in Tennessee, and it fairly appears from the bill that all its assets are in Tennessee.

2. That court was in error in holding that the bill does not allege such facts as would warrant a court of equity, at the instance of stockholders, in winding up the defendant corporation and distributing its assets, because (1) it appears that the original scheme is now impossible of consummation; (2) such nonuser and assignment to others of the powers and franchises of the corporation are alleged as entitle complainants to relief under our statutes; (3) the complainants are entitled to a distribution in specie under the charter; (4)

the bad faith of those in control in holding the stocks in the treasury until all interest of the common stockholders shall be consumed, by diversion of funds, entitled complainant to the relief sought; and (5) the corporation was organized to do business in Tennessee, and with intention that its property should be located here, and that by the sale of its realty, and the attempt to withdraw the consideration sums to Great Britain, the company has abandoned its corporate business.

There arises for determination, under these assignments of error, the question whether a court of equity of this State will assume jurisdiction of a proceeding to wind up the defendant corporation on the grounds set forth in the bill of complaint.

This, in turn, involves a consideration of the *status* and nature of this defendant as a corporation complying with and domesticated under the provisions of our foreign corporation statutes. Acts 1877, ch., 31; Acts 1891, ch. 122; Acts 1895, ch. 81.

It was held by this court, in *Coke & Coal Co.* v. *Steel Co.*, 123 Tenn., 428, 442, 131 S. W., 988, 991 (31 L. R. A. [N. S.], 278), that the result of the first-named act, as amended by the two last named, was in effect a legislative pronouncement that such corporations shall be "deemed and taken to be corporations of this State, the said corporations may sue and be sued in the courts of this State, and shall be subject to the jurisdiction of the State as fully as if created under the laws of Tennessee."

The insistence of complainants is that, under these statutes and the decisions based thereon, a distinct and separate corporate entity was created in this State when the Chattanooga Company, Limited, complied with the law by filing its charter in the proper office in this State—a corporation so far dissociated from the British entity as that it may be wound up in a Tennessee court in all respects as could a corporation originally chartered under the laws of this State, without reference to the *status* or condition of the foreign entity.

The true concept, as indicated by our decisions, based upon the statutes referred to, appears to us to be that a corporation so domesticated becomes, not a new and distinct entity, but only a corporation of this State *quoad hoc* any property and acts within its jurisdiction. *Ohio & Miss. R. Co.* v. *Wheeler* (Ind.), 1 Black, 297, 17 L. Ed., 130; *Young* v. *Iron Co.*, 85 Tenn., 189, 197, 2 S. W., 202, 4 Am. St. Rep., 752; 19 Cyc., 1204. It differs essentially from such corporations as were under consideration in *Grangers' Life Ins. Co.* v. *Kamper*, 73 Ala., 325, and *Memphis, etc., R. Co.* v. *Alabama*, 107 U. S., 581, 2 Sup. Ct., 432, 27 L. Ed., 518, which were corporations with distinct incorporators, stock issues, or directors, in the respective domesticating States.

The doctrine now is that "one State may make a corporation of another State, as thus organized and conducted, a corporation of its own, as to any property in its territorial jurisdiction. Illustrations of

these conclusions are now seen every day in the passage by States of enactments making foreign corporations doing business within the domestic jurisdictions domestic corporations, and amenable in all respects to the domestic laws and police regulations, notwithstanding the provisions of their foreign charters. But it remains equally true that, for many purposes of legal procedure and practical convenience in the administration of justice, each one of the bodies so created remains a domestic corporation within the State under whose legislature it has been called into existence. Clearly, such a corporation is a domestic corporation within each of the States whose legislation has created it, for the purpose of local jurisdiction to the application of local police regulation. Such a corporation is a resident of each of such States, for the purpose of the ordinary jurisdiction of its courts." 10 Cyc. 170, 171; 5 Thomp. Corp. (2 Ed.), sec. 6629.

This court, in *Coke & Coal Co.* v. *Steel Co.*, supra, cited and quoted opinions of the supreme court of the United States in support of the ruling there made that it was competent for a State to make a foreign corporation complying with its legislative acts so providing a domestic corporation, and commented, without disapproval, on the statement of limitation in *St. Louis R. Co.* v. *James*, 161 U. S., 545, 16 Sup. Ct., 621, 40 L. Ed., 802, that such domestication was "in regard to property and acts within the territorial jurisdiction," and also on the ruling in the *James Case* to the effect that a domestication of a corporation, after the

manner of that involved in this case, left outstanding or remaining in the State of its creation, an entity, of citizenship foreign to the domesticating jurisdiction, so to be treated in that jurisdiction for certain purposes indicated. The supreme court of South Carolina held the same way touching a corporation which had been made, in like manner, a domestic corporation of that State. *Calvert* v. *Railway Co.*, 64 S. C., 155, 36 S. E., 750, 41 S. E., 963, affirmed 187 U. S., 636, 23 Sup. Ct., 844, 47 L. Ed., 343. To the same effect is the later case of *Southern R. Co.* v. *Allison,* 190 U. S., 326, 23 Sup. Ct., 713, 47 L. Ed., 1078, wherein Mr. Justice Peckham, for the court, stated a distinction between a domestication, such as herein appears, and that form of domestication of a corporation which was considered in *Memphis, etc., R. Co.* v. *Alabama,* supra, and said that, "by reason of the language used in the Alabama act, there was a separate original Alabama corporation formed, which made it a corporation created as well as controlled by the State of Alabama."

That the defendant Chattanooga Company, Limited, became a domestic corporation *quoad hoc,* and not for all purposes as a wholly separate and unrelated entity, is further shown by the fact that by our Acts 1891, sec. 5, above cited, provision is made that, when a complying foreign corporation has no agent in this State upon whom process may be served, its property may be attached as that of a nonresident, thus affirmatively showing that the legislature did not conceive or intend that compliance should *ipso facto* work a creation of

a distinct body politic, and work a loss to the corporation of residence or citizenship in the State of its creation.

In *In re Standard Oak Veneer Co.* (D. C.), 173 Fed., 103, that able jurist, Judge Sanford, sitting in the United States district court in this State, held that a foreign corporation, so complying with our foreign corporation acts did not become a resident of this State, where the corporation retained its principal office in the State of creation, and its presented claim was based upon transactions conducted through such foreign office, so far forth as to be entitled to the priority awarded to creditors who are resident in Tennessee in the distribution of the assets of a foreign corporation itself also domesticated in this State under the cited statutes. Notwithstanding compliance and consequent domestication, it was held that the claimant corporation remained also a resident of the State of its creation, and, as such, was constitutionally to be denied its claim of right to share in priority, under the rulings in *Blake* v. *McClung*, 172 U. S., 239, 19 Sup. Ct., 165, 43 L. Ed., 432; *Blake* v. *McClung*, 176 U. S., 60, 20 Sup. Ct., 307, 44 L. Ed., 374, overruling *McClung* v. *Embreeville Co.*, 103 Tenn., 399, 52 S. W., 1001, and *Sully* v. *American Nat. Bank*, 178 U. S., 289, 20 Sup. Ct., 935, 44 L. Ed., 1076.

In *Young* v. *Iron Co.*, supra, it appeared that the city of Chattanooga was by the Iron Company's by-laws made the general office of the company; that all of its books, including its stock books and seal, were

there kept; that all of its officers resided there; the meetings of stockholders and directors were held there, where also was its plant and corporate property of every kind. It was held that, while a foreign corporation in one sense, that company, in view of its corporate acts, was to be deemed a domestic corporation as far forth as to give *situs*, for attachment of its shares of stock, in this State. There the "acts within the territorial jurisdiction" went to the extent of drawing even corporate *situs*, for the indicated purpose, into this jurisdiction as the place of the true home office of the corporation. Fact was allowed to overrule legal fiction. But it was not meant to be there ruled that every corporation which complies with our acts acquired, by virtue of that fact, *situs* for stock attachment purposes.

On the basis, therefore, of the defendant company being treated as a corporation domesticated only for purposes of jurisdiction in respect of property and transactions in this State, we have next for consideration whether a court of equity in this State will assume jurisdiction in a case where, as here, the corporation is not insolvent, at the instance of stockholders, to wind up the corporation on any ground stated in the bill of complaint.

Under the familiar rule that the court should make every reasonable presumption in favor of the bill of complaint when assailed by a demurrer, we are of opinion that the complainants must be taken to allege

that the undistributed assets of the defendant company are in this State.

Counsel of defendant company insist that the bill shows otherwise, and in accord with the truth, that the assets sought to be impounded are in Great Britain. If this appeared, or were made to appear, then we would have for further consideration whether a court of equity in this State, regardless of any question of potential jurisdiction over the defendant as a domestic corporation, would decline to assume or exercise jurisdiction. This, on the ground that, the governing officers and the property to be affected being out of the State, the court could render no effective decree, and would leave the claimants to seek their remedy in the jurisdiction where the corporation was created. *Edwards* v. *Schillinger*, 245 Ill., 231, 91 N. E., 1048, 33 L. R. A. (N. S.), 895, 137 Am. St. Rep., 308; *Clark* v. *Mutual, etc., Ass'n*, 14 App. D. C., 154, 43 L. R. A., 390; *State* v. *North American, etc., Co.*, 106 La., 632, 31 South., 172, 87 Am. St. Rep., 309; *Williston* v. *Mich., etc., R. Co.*, 13 Allen (Mass.), 400; *Smith* v. *Mutual, etc., Co.*, 14 Allen (Mass.), 336; 19 Cyc., 1238, 1345.

Manifestly, as to the phase of insolvency, our cases which relate to the winding up, at the instance of Tennessee claimants, of insolvent foreign corporations (*Smith* v. *St. Louis, etc., Ins. Co.*, 3 Tenn. Ch., 502; Id., 6 Lea, 564, and cases in accord) are aside. We have here no such case, whether the principal defendant be deemed a domestic or a foreign corporation for that assumed purpose.

But a phase of the decisions in the last-cited case is relied on by complainants in support of their contention that a court of equity will award to a resident stockholder, even in a foreign corporation, relief of winding up its affairs, so far as assets within the State are concerned, in a proper case. Code, Shannon's, provides (as did the Code of 1858, in sections 3431, 4294, and 4295) as follows:

"Sec. 5187. A corporation is not dissolved by the nonuse or assignment to others, in whole or in part of its powers, franchises, and privileges, unless all the corporate property has been appropriated to the payment of its debts, and any creditor, for himself and other creditors, whether he has recovered judgment or not, or any stockholder, for himself and other stockholders may file a bill under the provisions of this chapter, to attach the corporate property, and have such property applied to the payment of the debts of the corporation, and any surplus divided among the stockholders."

"Sec. 6103. The creditors of a corporation may also, without first having obtained a judgment at law, file a bill in the court of chancery, to attach the property of the corporation, and subject the same, by sale or otherwise, to the satisfaction of their debts, when the corporate franchises are not used, or have been granted to others in whole or in part.

"Sec. 6104. In such cases the court may appoint a receiver, take an account of the affairs of the corporation, and apply the property and effects to the pay-

ment of debts *pro rata,* and divide the surplus, if any, among the stockholders.''

In the case last cited the statute was construed to apply to creditors of a foreign corporation as well as a domestic corporation, and this, whether the effort of the creditors was to base their remedy on insolvency of the coropration or on its having ceased to do business and to use its franchise.

Chancellor Cooper said: ''The argument is that the provisions of our Code—sections 3431, 4294, 4295 (Shannon's, secs. 5187, 6103, 6104)—apply to domestic corporations, and the property of foreign corporations is left to be seized by the more diligent claimants under other provisions of the law. . . . Both the statutes and the decisions speak of corporations, without drawing any distinction between domestic and foreign corporations, and the principle of the decisions, as shown by the authorities cited, is manifestly based on the nature of corporations and corporate funds generally. And it would be a curious departure from uniformity, so desirable in the administration of law, to hold that a different measure of justice should be meted out to creditors, dependent upon whether their debtor was a domestic or foreign corporation. Most clearly there is nothing in the language of the Code or the decisions to give countenance to the distinction contended for.'' 3 Tenn. Ch., 504, 505.

By parity of reasoning, the quoted sections of the Code sustain an action of like character on the part of stockholders there named along with creditors.

Complainants insist that they have presented a proper case for the winding up of the company and a distribution of its assets; their prime contention being that the original scheme of the coventurers is now impossible of consummation, and has been definitely abandoned. They urge that the object of the corporation was to acquire and develop land in Hamilton county; that practically no development had been made and no profits had been earned, in consequence of which the lands had been sold, and the scheme abandoned. This contention takes no note of the alternative provisions of the charter, stipulating that the company might "sell its undertaking, or any part thereof, for such consideration as the company may think fit, and, in particular, for shares . . .. of any other company having objects altogether, or in part, similar to those of this company," or of the further provision that the company shall have power "to hold or otherwise deal with stock or shares." The bill of complaint shows that the governing body of the company is, in pursuance of this feature of the British franchise, proposing to hold the consideration stocks, thus carrying on the business. There is therefore no nonuse of that franchise. Complainants invested in the enterprise by taking shares in the British entity under the British charter, and they cannot validly urge that a discontinuance of the use of any feature of the franchise from this State touching the ownership and control of land here, acquired on or after domestication, gives them a right to treat, or have treated, the

enterprise as abandoned, and the company wound up. The case of *O'Connor* v. *Knoxville Hotel Co.*, 93 Tenn., 708, 28 S. W., 308, urged on us, manifestly is no authority for the contention that this enterprise is, on these facts, impossible of consummation.

Having failed, first, to show insolvency, and, as just demonstrated, to show discontinuance of the business of the corporation and nonuse of its franchises, in neither aspect of the code section quoted above (Code, Shannon, sec. 5187) do complainants make out a case for the winding up of the affairs of the company.

All other matters assigned as error do not fall within the purview of the bill of complaint and the prayer for relief. No relief by way of injunction or otherwise is asked in respect of what are claimed to be *ultra vires* acts of the directors in Great Britain in respect to the payment of dividends on the preferred stock, to complainants' prejudice.

An effort is also made in this court to convert the bill into one for a construction of the charter in relation to the rights of the preferred stockholders and the common stockholders, respectively, in a distribution of assets on dissolution; but, since there is a failure to show grounds for winding up, and the holders of preferred stock are not before the court, no such issue arises for solution on the record. As said by the supreme court of the United States: "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before

it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Kimball* v. *Kimball,* 174 U. S., 158, 19 Sup. Ct., 639, 43 L. Ed., 932; *Taylor* v. *Insurance Co.,* 97 Va., 60, 33 S. E., 385, 45 L. R. A., 621, 627.

The demurrer to the bill was properly sustained, and the decree of the court of civil appeals is affirmed.

THOMPSON *v.* INTERSTATE LIFE & ACCIDENT CO.

(*Knoxville.* September Term, 1913.)

1. **INSURANCE. Losses. Demand and refusal. Penalty. Time of action.**

Under Acts 1901, ch. 141, declaring an insurance company, when a loss occurs, and it refuses to pay it within sixty days after demand, liable to pay the policy holder a penalty in addition to the loss, suit must be delayed sixty days after demand only when the company does not answer the demand within that time, and, the refusal being sooner, suit may be commenced immediately thereafter. (*Post*, *pp.* 527, 528.)

Acts cited and construed: Acts 1901, ch. 141.

2. **INSURANCE. Losses. Demand and refusal. Penalty.**

Where, on refusal to pay an indemnity under an accident and sick benefit policy, bill therefor and for the penalty provided by Acts 1901, ch. 141, was filed, and, additional losses thereafter accruing, amended and supplemental bills to recover them were filed, more than sixty days having elapsed before their filing, the filing of the bill was a sufficient demand, and the filing of the answers, denying liability, a refusal to pay, as regards right to recover penalty on the additional losses. (*Post*, *p.* 528, 529.)

FROM HAMILTON.

Appeal from Chancery Court, Hamilton County.—T. M. MCCONNELL, Chancellor.

PRITCHARD & SIZER and CHAMBLISS & CHAMBLISS, for appellant.

MEACHAN & MCGAUGHY, for appellee.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

One question presented by a petition to rehear,* which has not heretofore been determined by this court, arises upon the following facts:

The complainant held an accident and sick benefit policy with the defendant company and filed the original bill to recover the indemnities provided for in the policy, together with 25 per cent penalty for the failure of the company to pay the indemnities, as provided by chapter 141, Acts of 1901. Demand was made upon the company and payment refused. The original bill was filed within thirty days after payment was declined. It is insisted in the petition to rehear that the penalties are not recoverable because the suit was brought within less than sixty days from the time of demand of payment and refusal.

The statute referred to provides:

"The several insurance companies of this State, and foreign insurance companies and other corporate firms or persons doing insurance business in this State, in all cases when a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made by the holder of the said policy on which the said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent and the liability for said loss," etc.

We hold that, under a proper construction of the foregoing statute, the defendant is not entitled to a delay of sixty days after payment has been refused. The manifest purpose of the legislature in fixing the limit of sixty days after a demand as the time in which the defendant could withhold payment was to enable it to investigate the nature of the loss and determine its liability under the contract. If the investigation has already been made, or if the defendant is content with the facts in hand to refuse payment, no good purpose could be served by requiring the policy holder to wait sixty days before commencing suit. The language of the statute does not require such a construction. It is provided that, if "they refuse to pay the same within sixty days after a demand shall have been made," the penalty is recoverable. This means that the defendant may decline to answer the demand for sixty days, and, as long as no refusal is made within that period, the claimant would necessarily be required to withhold suit; but, if the refusal to pay is made within sixty days after the demand, the right to commence the suit accrues immediately upon the refusal. Sixty days is the extreme limit allowed by the legislature in which the company can investigate the question of its liability, and, if it fails to respond to the demand for payment within that time, the suit may be commenced without proof of a refusal.

There were amended and supplemental bills to recover additional losses accruing after the commencement of the original bill. The petition to rehear pre-

sents the point that there is no proof of demand and refusal to pay the losses claimed by these bills, but more than sixty days had elapsed before these bills were filed, and the filing of the bill was a sufficient demand by the complainant, and the filing of the answers denying the liability was an explicit refusal to pay by the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1913.

FOURTH NATIONAL BANK OF NASHVILLE *v.* NASHVILLE, C. & ST. L. RY. CO.

(*Nashville.* December Term, 1913.)

1. **CARRIERS. Freight. Delivery without bill of lading.**

Though a railroad company wrongfully delivered grain without the surrender of the bill of lading as required by it, the consignors had no right of action against it if they were not injured because they had received payment for the grain. (*Post*, *p.* 535.)

Case cited and approved: Witt & Watkins v. Railroad, 99 Tenn., 442.

2. **CARRIERS. Freight. "Bill of lading."**

A "bill of lading" is not a negotiable instrument but is merely a contract by a carrier to deliver the goods described at a particular place according to the usual course of transportation. (*Post*, *p.* 536.)

Cases cited and approved: Merchants', etc., Bank v. Railroad Co., 102 Md., 573; Midland National Bank v. Railroad Co., 132 Mo., 492; Ratzer v. Railway Co., 64 Minn., 245; Railway Co. v. Johnson, 45 Neb., 57.

3. CARRIERS. Bill of lading. Bona fide transferee.

Complainant bank first accepted a bill of lading, covering a shipment of grain, and an attached draft on February 10th, and that draft and three other drafts against the same bill of lading were subsequently dishonored and taken up by the maker, and when the fifth draft was deposited, which was likewise dishonored and was not taken up, the bill of lading had been issued for more than three months. The grain covered by it was a domestic shipment to an adjoining State. *Held*, in view of the staleness of the bill of lading, that the bank was not an innocent transferee of the bill of lading and was estopped from recovering from the railroad company for negligently delivering the grain without the surrender of the bill of lading. (*Post*, *p.* 538.)

4. ESTOPPEL. Equitable estoppel. Diligence.

One relying on an estoppel must have exercised such reasonable diligence as the circumstances require. (*Post*, *p.* 537.)

Cases cited and approved: Crabtree v. Bank, 108 Tenn., 483; Brant v. Va. Coal, etc., Co., 93 U. S., 326.

5. ESTOPPEL. Equitable estoppel. Knowledge of parties.

Where both parties have the same means of ascertaining the truth, no estoppel can exist. (*Post*, *p.* 537.)

6. ESTOPPEL. Equitable estoppel. Negligence.

One who conducts himself with á careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss cannot invoke the doctrine of estoppel. (*Post*, *p.* 538.)

7. ESTOPPEL. Good faith.

One claiming the benefit of an estoppel must have proceeded with the utmost good faith. (*Post*, *p.* 538.)

8. **ESTOPPEL. Negligence.**

If a ground of estoppel is based on negligence, the negligence must have been the proximate cause of the conduct of the complaining party. (*Post*, *p.* 539.)

9. **CARRIERS. Delivery of goods. Bill of lading. Failure to require. Evidence.**

In an action by the holder of a bill of lading for damages because defendant railroad company surrendered freight without presentation of the bill of lading, evidence *held* to show that such negligence by the railroad company was not the proximate cause of the bank's loss. (*Post*, *p.* 539.)

FROM DAVIDSON.

Appeal from Chancery Court, Davidson County.—JOHN ALLISON, Judge.

FRANK SLEMONS, SLOSS D. BAXTER, and CLAUDE WALLER, for appellant.

STONES & STOKES, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit ways brought by the Fourth National Bank of Nashville against the railway company to recover from the latter the value of a shipment of grain made on an order notify bill of lading by Miller & Co., of Nashville, to the Santee Cypress Company, of Ferguson, S. C., which bill of lading was negotiated by the shipper at complainant bank. The shipment of grain

was released by the final carrier to the consignee without surrender of the bill of lading.

The suit was brought under the Carmack Amendment (chapter 3591, section 7, 34 Stat. at L., 584, 595 [U. S. Comp. St. Supp., 1911, p. 1307]) to the Hepburn Act to hold defendant railway company as the initial carrier liable for the default of the Atlantic Coast Line, which was the last carrier and the carrier handling the grain to the point of its destination.

The railway company answered and interposed several defenses. The chancellor rendered a decree in favor of complainant, and the railway company has appealed to this court.

Miller & Co. delivered to the railway company at Nashville some 400 bags of oats on February 10, 1910, to be shipped to the order of consignees at Ferguson, S. C., with directions to notify the Santee Cypress Company at the latter place. The railway company issued a through bill of lading in customary form containing, among other things, the following stipulation: "The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property."

On this same day Miller & Co. made a draft on the Santee Cypress Company for $1,041, to which draft was attached the bill of lading just referred to. The draft was deposited on account of Miller & Co. in complainant bank and cash credit was given to them for the amount thereof, less .025 per cent.

This draft was dishonored and returned. Miller & Co. paid to the bank the amount of the draft and on March 5, 1910, made another draft with this bill of lading attached on the Santee Cypress Company. The second draft was returned and taken up by Miller & Co., and on March 31, 1910, a third draft with the bill of lading attached was made on the above-mentioned consignee. The third draft was also dishonored, and on April 21, 1910, a fourth draft with the same bill of lading attached was made by Miller & Co. on the same parties, which draft was returned unpaid. On May 18, 1910, a fifth draft, to which was attached this same bill of lading, was made by Miller & Co. on the cypress company, and this draft was likewise dishonored.

Upon the return of the first four drafts, Miller & Co. made the amount of each good at the bank. They had received cash credit for all the drafts, less discount. By the time the fifth draft was returned, Mr. Miller, the head of this concern, had died, and his firm proved insolvent. Hence this suit by the bank against the railway company.

The grain in question was ordered from Miller & Co. by the Santee Cypress Company on open account, and no authority was given to Miller & Co. to draw on the consignee. When the shipment arrived at Ferguson, S. C., there appeared to be a shortage in it. On March 14th, however, a check was sent to Miller & Co. by the cypress company for the amount of the consignment, less the shortage, and the cypress company

having credit with the agent of the railroad company at Ferguson, S. C., the latter released the grain, on explanation that it had been paid for without the surrender of the bill of lading. The shortage in question was made good by Miller & Co., and on April 27th the cypress company sent a check for the balance of this order.

So that on May 19, 1910, when the draft with the bill of lading here sued on was last deposited in complainant bank, the grain represented by the bill of lading had been some time delivered to the consignee, and the shipper had been paid therefor.

At this time the consignors had no claim whatever against the railway company by reason of their possession of this bill of lading. Proper delivery had been made of the grain shipped, and the consignors had been paid for the same. While consignors held the bill of lading, its surrender to the railway company, so far as they were concerned, at this time would have been merely a matter of ceremony. This is pointed out in *Witt & Watkins* v. *Railroad,* 99 Tenn., 442, 41 S. W., 1064.

Although the railway company breached its duty in delivering this grain without the surrender of the bill of lading, no damages resulted to the consignors by reason of this breach, for they had received payment for their grain. The consignors had no right of action or just claim against the railway whatever.

There is some conflict of authority as to the rights of an innocent transferee of a bill of lading, fraudu-

lently negotiated, after there has been a delivery of the goods. It is not necessary to review these authorities here, owing to the peculiar circumstances of this case.

A bill of lading is not a negotiable instrument, but, if this one should be treated as such, there could be no recovery by the bank in this case. For if this bill of lading be considered as negotiable, it was "past due" at the time it was last transferred to the bank. A bill of lading is a contract or undertaking on the part of a carrier to deliver the goods therein described at a particular place, subject to the conditions therein contained, according to the usual course of transportation. This bill of lading was dated February 10, 1910. It covered a shipment from Nashville to a point in a neighboring State, and in ordinary course of carriage such shipment was due to be delivered long prior to May 19, 1910, the date upon which said bill of lading was last negotiated.

But, as said above, a bill of lading is not a negotiable instrument, and the rights of the parties are not to be determined by the application of rules controlling the transfer of commercial paper.

The cases which declare a carrier liable to the *bona fide* holder of a bill of lading fraudulently negotiated, after delivery of the consignment, proceed on the theory of estoppel. They rest on the principle that, where one of two innocent parties must suffer, he, by whose fault the loss was occasioned, must bear it. It is said that when a carrier issues a bill of lading, a

symbol of property, undertaking to deliver such property to the holder thereof, it is liable to one who acquires this bill of lading for value, if it has made delivery to another, even to the consignee, without the surrender of the bill of lading, but leaving some outstanding, and a loss is thereby occasioned to an innocent transferee. *Merchants,' etc., Bank* v. *Railroad Co.*, 102 Md., 573, 63 AItl., 108; *Midland National Bank* v. *Railway Co.*, 132 Mo., 492, 33 S. W., 521, 53 Am. St. Rep., 505; *Ratzer* v. *Railway Co.*, 64 Minn., 245, 66 N. W., 988, 58 Am. St. Rep., 530; *Railway Co.* v. *Johnson*, 45 Neb., 57, 63 N. W., 144, 50 Am. St. Rep., 540; Hutcheson on Carriers, vol. 1, sec. 182.

Is the complainant bank an innocent transferee, and is it entitled to recover in this case?

We think not. Applying familiar principles of the law of estoppel, the bank must be denied relief herein.

A party setting up an estoppel is bound to the exercise of reasonable diligence—such diligence as the circumstances of the case require. *Moore* v. *Bowman*, 47 N. H., 494. This rule is probably the foundation of the other rule that, where both parties have the same means of ascertaining the truth, there can be no estoppel. *Crabtree* v. *Bank*, 108 Tenn., 483, 67 S. W., 797, and *Brant* v. *Va. Coal, etc., Co.*, 93 U. S., 326, 23 L. Ed., 927.

That is to say, if a party decides upon a matter or determines his course with a careless indifference to means of information reasonably within his reach, or if he is heedless of circumstances highly suspicious

and sufficient to warn him, he will not be entitled to complain and invoke estoppel.

To hold that one, who shuts his eyes and disregards danger signals flaunted before his view, is an innocent party, entitled to invoke the doctrine of equitable estoppel, would be to encourage fraud. A person who so conducts himself scarcely acts in good faith, and it is well settled that a party must proceed in the utmost good faith to claim the benefit of an estoppel. 16 Cyc., 747, and cases there cited.

Referring again to the facts heretofore set out, complainant bank first took this bill of lading and a draft for the value of the grain February 10th. This draft was dishonored, and likewise three other drafts with the same bill of lading were dishonored before the final draft was negotiated. At the time the fifth draft was deposited, this bill of lading, covering a domestic shipment, was more than three months old. It was stale. It had previously passed through the bank's hands four times. The period during which this grain had been transported and delivered in ordinary course of business had long since expired. The bank should have known that something was wrong. It should have made some inquiry as to this collateral before taking it for the fifth time, if it expected to be protected as an innocent holder. The transaction of making five drafts on the same bill of lading was out of the ordinary and so unusual as to excite suspicion and to require investigation. The bank has been so negligent and remiss in this matter as to deprive it

of the status of an innocent transferee and to compel the court to rebuff the effort to obtain an equitable estoppel in its behalf.

Another principle is that, when an estoppel is sought to be based on negligence, such negligence must be the proximate cause of leading the complaining party into the mistake. 16 Cyc., 772, and cases cited.

While the carrier was of course negligent in delivering this grain without requiring the surrender of the bill of lading, we hardly think such negligence was the proximate cause of the bank's loss in this case. It is fairly inferable from this record that the bank received these drafts from the consignors and gave the latter cash credit therefor more by reason of the standing and supposed responsibility of the consignors than upon the faith of the bill of lading. The testimony of a bank official in this record shows that the account of Miller & Co. was very satisfactory, and that they enjoyed good credit at the bank. Every time one of these drafts was deposited by Miller & Co. and credited to their account, the bank made a profit of about $2.50.

Had this credit to Miller & Co. been extended solely or principally on the faith of the bill of lading, it is more than likely that the bank would have refused further credit thereon when the first or second draft was dishonored. It certainly would not have extended credit for the fifth time on collateral which had four times proven unavailable. The drafts were cashed, as we think, rather on the individual credit of Miller & Co. than on the faith of this bill of lading. Consequently

the bank's mistake as to the credit of Miller & Co. proximately occasioned its loss and not reliance upon the bill of lading.

Other interesting questions are presented in the case respecting the application of the Carmack amendment to these facts. We do not, however, find it necessary to consider them in this opinion, inasmuch as we must dismiss this bill for the reasons heretofore stated. The decree of the chancellor will be reversed.

NICHOLS *v.* LEBANON & HARTSVILLE TURNPIKE CO.

(*Nashville.* December Term, 1913.)

JUSTICES OF THE PEACE. Process. Sufficiency.

A warrant issued by a justice of the peace in the form prescribed by Shannon's Code, sec. 5958, calling upon defendant to answer "in a civil action on an account under five hundred dollars," was sufficient as against an objection that it failed to state a cause of action. (*Post*, *p.* 542.)

Code cited and construed: Sec. 5958 (S.).

Cases cited and approved: Railroad v. Flood, 122 Tenn., 56, 70; Railroad v. Davis, 127 Tenn., 167.

FROM WILSON

Appeal from the Circuit Court of Wilson County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—JNO. E. RICHARDSON, Judge.

LILLARD THOMPSON, for plaintiff in error.

JULIUS WILLIAMS and W. S. FAULKNER, and JOE HOLMES, for defendant in error.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This action originated before a justice of the peace, and by appeal was tried in the circuit court before a jury; the judgment based upon its verdict being against Nichols, who appealed to the court of civil appeals. There cast, he has petitioned for a writ of *certiorari* to bring the cause into this court for review.

An error assigned in the court of civil appeals and in the petition referred to is: That the circuit court erred in overruling Nichols' motion in arrest of judgment, the ground of which motion was that the warrant on which the case was tried in the circuit court did not state a cause of action.

The warrant is as follows:

"Summons J. C. Nichols, Bob Nichols, and Ross Nichols to appear before me or any other justice of the county to answer Lebanon and Hartsville Turnpike Company for the use of H. P. Kinney in a civil action on account under five hundred dollars. This 4th day of December, 1912.

"H. E. Doss, J. P."

It will be noted that the warrant is in strict accord with the form prescribed by Code (Shannon) section 5958, which is as follows:

"Summons A. B. to appear before me, or some other justice of the peace for said county, to answer C. D. in a civil action by note [or upon an account, or otherwise, as the case may be], under —— dollars. This —— day of ——, 19—. E. F., Justice."

The petitioner, Nichols, cites and relies on the cases of *Railroad* v. *Flood,* 122 Tenn., 56, 70, 113 S. W., 384, and *Railroad* v. *Davis,* 127 Tenn., 167, 154 S. W., 530. The actions begun by warrants of justices of the peace in the two cases cited were for damages arising out of torts, and it was held that they failed to carry, to the defendants sued, notice of their claimed wrongful acts, which would enable them to prepare for trial. The

reasoning underlying those cases is not applicable in actions before a justice of the peace which are based on contracts or transactions giving rise to indebtedness, as by note or account, in respect of which the defendant may fairly be assumed to have had knowledge, and therefore not to be left without notice of that for which he is called to answer.

The Code form is by the legislature made sufficient in so far as it particularizes, and, as seen, the Code section quoted provides specifically that a summons to answer in a civil action before a justice of the peace based "upon an account" shall suffice as a commencement of the suit.

No such particularity in specification is employed in the Code form in respect of actions for damages for tortious acts, and such were involved in the two cases relied on for reversal.

In the *Flood Case,* Mr. Justice Shields, in delivering the opinion of the court, cited with approval *Watkins* v. *Kittrell,* 3 Baxt., 38, 42, in which the summons or warrant recited as the ground of the action, "a debt due by a constable's receipt;" and Judge McFarland, in reference to it, said, "This clearly gave notice to the defendant what the cause of action was, what transaction was to be contested." It therefore appears that the court in the *Flood Case* must have had in mind the distinction which we here take. It at least reaffirmed *Watkins* v. *Kittrell,* which certainly concludes petitioner in his claim of error.

The court of civil appeals so ruled. Writ denied.

STATE *v.* WAINWRIGHT.

(*Nashville.* December Term, 1913.)

INDICTMENT AND INFORMATION. Value. Larceny.

That an indictment for larceny, in its statement of the value of the property, omitted the dollar sign and contained an elongated decimal point extending under the two naughts did not render it fatally defective. (*Post*, p. 547.)

Cases cited and approved: Hunt v. Smith, 9 Kan., 137; State v. Schwartz, 64 Wis., 432; Northrop v. Sanborn, 22 Vt., 433.

Cases cited and disapproved: Barnes v. Brown, 1 Tenn., Chy. App., 726; Hamilton v. Gaslight Co., 115 Tenn., 153; Anderson v. Post (Tenn. Chy. App.), 38 S. W., 283; Randolph v. Metcalf, 46 Tenn., 400.

FROM MAURY.

Appeal from Criminal Court, Maury County.—W. B. TURNER, Judge.

W. W. FAW, Assistant Attorney-General, for the State.

PEEBLES & FORGEY, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The defendant was indicted in the circuit court of Maury county for stealing a ham. On motion the trial judge quashed the indictment, and the State appealed

to this court and has assigned error. The question made on the indictment was that it did not contain an averment of value. The language on that subject was: "That Mary Wainwright heretofore on the —— day of October, 1912, in the said county, feloniously did steal, take, and carry away from the possession of one R. P. Pigg one ham of the value of 200, the personal property of the said R. P. Pigg, against the peace and dignity of the State."

The first question is whether the mark starting at the figure "2" and running under the two naughts (thus, "200") can be read as a decimal point between the figures and the naughts; and the second is whether, if so read, the expression "200" can be properly construed as evidence of an intention to state the value at $2. We are of opinion that both questions should be answered in the affirmative. We judicially know that the decimal point in business practice is often so elongated; and we are of opinion that the character could have been used in the association in which it appears. If it be a decimal point, the only reasonable conclusion in that the purpose was to express the value of the ham as being $2. That is to say, given the decimal point, the court should infer the dollar mark, making the whole expression read "$2.00." This is in harmony with the construction reached by the supreme court of Kansas in the case of *Hunt* v. *Smith,* 9 Kan., 137, and by the supreme court of Wisconsin in the case of *State* v. *Schwartz,* 64 Wis., 432, 25 N. W., 417. *Hunt* v. *Smith* was a condemnation proceeding. In

that case the commissioners, in reporting the valuation of the land taken and the damages to that not taken, used numerals only and omitted to use dollar marks or words "dollars" and "cents," or any abbreviation thereof, but interposed a decimal point. The supreme court of Kansas said: "Dollars are the legal money units of this country, made so by the laws of the United States. 1 Stat. at Large, 248, par. 9; 1 Bouv. Law Dict. title. 'Dollar.' Hence, whenever figures are used intending to represent money, such figures must of course be understood to represent 'dollars,' unless a different intention is clearly expressed. The point or dot, resembling a period in punctuation, separating certain figures on the right from those on the left, is the decimal point. It makes the figures on the right decimals of a unit of whatever is intended to be expressed by those on the left. Those on the left, as we have already seen, are intended to represent dollars; hence those on the right must represent decimals of dollars. As only two figures on the right are thus separated from the others, these two figures must represent hundreds of dollars or, in other words, 'cents.' This is well settled by almost universal usage everywhere in the United States." Quite an elaborate and satisfactory discussion of the matter follows in the opinion of the court, but we need not reproduce more than the language we have already quoted.

In *State* v. *Schwartz* the question was whether an instrument in the form of a promissory note for the payment of "25.00 as per deed, 10 per cent till paid,"

was a note for $25 and could be so held under an indictment or information for the forgery thereof, without the averment of extrinsic facts showing that such was its character. This question was answered in the affirmative; the supreme court of Wisconsin saying: "The controlling question is, therefore: Does the forged instrument purport on its face to be a promise by Baggs, the maker, to pay the defendant $25 although it contains neither the dollar mark nor the word 'dollars?' If this question be answered in the affirmative, it is entirely clear that such forged instrument was properly admitted in evidence; that there was no error in the instruction which the court gave the jury; that such alteration constituted the crime of forgery; and that the information is sufficient without an averment therein that the figures '25.00' meant $25.00. On principle and authority we think the question should be answered affirmatively."

In the case last cited the court referred to the case of *Northrop* v. *Sanborn,* 22 Vt., 433, 54 Am. Dec., 83, which we have also examined. The instrument under consideration there was an order drawn for "37.89," without any dollar mark or word expressing dollars. This was held a valid order for $37.89. The court, speaking through Redfield, J., said: "The law of the United States Congress, establishing our national currency, having declared that it shall consist of the dollar, as a unit, and the decimal parts of the dollar, as dimes and cents, it would seem the necessary legal intendment that a contract expressed in figures should

be in the currency of the country. If prefaced by the usual sign ($), no one could entertain doubt; and that is nothing but a mark to signify that the national currency is intended. Without that we think the legal intendment is the same."

We are referred to certain cases in our reports as out of harmony with this view, viz., *Barnes* v. *Brown*, 1 Tenn. Chy. App., 726; *Hamilton* v. *Gaslight Co.*, 115 Tenn., 153, 90 S. W., 159; *Anderson* v. *Post* (Tenn. Chy. App.), 38 S. W., 283; *Randolph* v. *Metcalf*, 6 Cold., 400. All of these were tax cases where the construction is always strict, in order to prevent extortion and to save rights. The cases referred to never have been extended beyond that subject; nor do we think they should be. Moreover, in the facts stated in those cases it did not appear there was any decimal point, and a careful reading of them will indicate that the absence of this decimal point was really in the mind of the court, since it appears that the court decided those cases on the theory that there was nothing to indicate the money character of the figures. In *Barnes* v. *Brown* the absence of the decimal point was distinctly referred to. The cases generally speaking, were put upon the absence of the dollar mark. What would have been the result if there had been a decimal point we need not consider further than to say that the court in all of the cases held that perpendicular ruled lines extending the whole length of a a page of the tax books could not be treated as decimal divisions. So in those cases the facts before the court

indicated a set of figures without either dollar marks or decimal points, and on that ground the figures were treated as wholly uncertain. We do not think the cases we have just referred to are in conflict with the construction which we have given the indictment before us in the present case.

We are of opinion, therefore, that the trial judge committed error in quashing the indictment. His judgment must therefore be reversed, and the cause remanded to the circuit of Maury county for trial.

Coles *v.* E. C. & H. E. Morrow.

F. H. & C. R. Morgan *v.* Same.

(*Nashville.* December Term, 1913.)

1. **EXCHANGES. Dealings. Parties.**

Where a broker, who was a member of a board of trade operating under rules authorizing members to act as brokers between other members only, except in the making of contracts between members and authorized agents of carriers, or insurance or banking companies in connection with their legitimate business, negotiated contracts of sale or purchase with another member, who disclosed the buyer or seller, and the contracts were confirmed, the contracts were the broker's own contracts, and not for the benefit of his customers not members, though the broker issued to each customer an instrument in the form of a confirmation of the contract of sale or purchase on his account. (*Post*, *p.* 557.)

2. **GAMING. Gambling transactions. Purchase on margin.**

Where a customer dealt with a broker, who was a member of a board of trade, by purchasing grain on margin, without any purpose of receiving grain, and on the understanding that if the price declined so as to consume the margin, the customer should put up an additional margin or the broker could close out the transaction and charge the customer with the difference between the price at which the supposed purchase was made and the subsequent sale at market price, the transaction was a gambling transaction, and the money received by the broker in the conduct of his business was recoverable by the customer. (*Post*, *pp.* 562, 563.)

3. **GAMING. Recovery of money lost. Parties entitled to recover. Statutes. Construction.**

Shannon's Code, sec. 3162, authorizing actions to recover for the benefit of the wife or children of the loser of money in a gambling transaction, does not limit the right to recover

for the benefit of minor children of a loser in a gaming transaction, but a recovery may be had for the benefit of adult children. (*Post*, *p.* 564.)

Code cited and construed: Sec. 3162 (S.).

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court. —JOHN ALLISON, Chancellor.

JAMES L. WATTS, for plaintiff.

CHARLES C. TRABUE, for defendants.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

Both of these cases were brought originally in the chancery court of Davidson county, and judgments were rendered in each against the defendants thereto; but the amount involved in the first case having fallen below the sum required to justify an appeal to this court, the appeal was prosecuted to the court of civil appeals, and the judgment was there affirmed. The case was then brought here by the writ of *certiorari*. The second case was appealed directly to this court from the chancery court. Both cases were tried in the chancery court on the same evidence, so far as concerned the vital points on which the controversy de-

pends, and they were tried in the same manner here. The evidence was taken originally in the *Coles Case*, but was also used in the *Morgan Case*.

Each case was brought to recover money alleged to have been paid the defendants in the prosecution of gambling transactions. There is no controversy about the sums expended, except as to one item in the *Morgan Case*. Upon this point we shall, further on, state our conclusions, and also upon still another point in that case, which we shall not now more specifically mention. The only real controversy is whether the transactions complained of were gambling transactions.

At the time the money was paid to them defendants held themselves out as brokers and bankers doing business at No. 205 Third Avenue North, in the city of Nashville. Their place of business consisted of a room twenty-five by sixty feet. At one end was a blackboard, and in front of this board were twelve chairs for their customers. The defendants were the heads of the business, but they had in their employ one Frank W. Dillion, who was general manager, and also operator of a private wire into the business place of the Board of Trade of the City of Chicago. Defendants were members of this organization. As transactions were had on the floor of that Exchange, sales of wheat, corn, or other products dealt in there, the prices at which the sales were made, were reproduced on the blackboard, within a few seconds after the transactions occurred in Chicago. The prices on such

actual transactions were placed on the blackboard for the information of defendants' customers, to guide them in their fictitious deals in the various commodities names on the board; that is, as materials on which to base their judgment as to the probable course of the market, in order that they might act in the light of such course of the market, mirrored in its momentary fluctuations in the Exchange. If anyone desired to make a deal, the custom was to notify Mr. Dillion, and he wrote the instruction down in briefest memorandum, and telegraphed the substance of it in the name of C. E. & H. E. Morrow to Logan & Bryan, in Chicago, who were also members of the Board of Trade. The order might be to buy or sell so many thousand, say 5,000 bushels of wheat, or corn, for May delivery, at a stated price, say 98¾ cents per bushel. Logan & Bryan on receiving the order would make the purchase or sale on the floor of the Exchange, and notify defendants by wire that this had been done, and the next day a letter would follow giving the name of the person to whom the sale had been made, or from whom the purchase had been made, if the order was for a purchase. These were called confirmations. And the slips of paper on which they were written and printed contained the notice or stipulation that all deals were made pursuant to the rules of the Board of Trade. One of these rules was, in substance, that no deals should be made which did not contemplate an actual delivery, and that there should be no trading merely for the purpose of, and with the expectation of, set-

tling by differences between the contract price and the market price. Another rule was expressed as follows:

"IV. A. Members may act as brokers between other members only, except in making contracts between members of this association and authorized agents of transportation companies, vessel owners, railroad, insurance or banking companies in connection with the ordinary legitimate business of the latter, but in all cases the agent or broker of such person, firm or corporation, shall be held liable both for the acceptance of contracts by alleged principles and for the faithful execution of the same, under the rules of the association, by such principal. Provided that on C. I. F. contracts for grain for shipment to points outside Chicago, the broker so contracting may, if desired, give up to members for whose account such contracts have been made, the name of his principal, even though such principal be not a member of this association. Provided, however, that in such cases brokers shall be held liable both for the acceptance of such contracts and for their faithful performance under the rules of this association.

"B. Brokers shall be held personally liable on any transaction made by them until they have given the name of a principal acceptable to the other party to the transaction.

"C. A commission or brokerage must be paid on every transaction as prescribed in this rule."

Pursuing this rule, the orders to Logan & Bryan referred to went forward in the name of defendants, as

already stated, as their orders, and for their benefit, and the confirmations came back to them in the same way, showing in each instance that the sale, or purchase, had been made to or by the person named in the confirmation as seller or buyer, as the case might be. The confirmations usually contained several transactions, embracing deals started by different customers of defendants. The following example will illustrate a series of transactions wherein purchasers were confirmed, viz.:

Logan & Bryan,
Commission Merchants,
No. 2 Board of Trade.

Chicago, 12-21-1911.

E. C. & H. E. Morrow,

.....

We have this day *bought* for your account:

All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Board of Trade of the City of Chicago and the rules, regulations and requirements of its board of directors, and all amendments that may be made thereto.

Quantity.	Delivery.	Article.	Price.	Of Whom Bought.
10	May	W	98¾	King, Farnum & Co.
10	"	"	98⅝	McCarthey
				Finley, Barrell & Co.
10	"	"	98⅜	King, Farnum & Co.
5	"	"	98¼	Copenhagen
				King, Farnum & Co.
10	July	W	93¾	Fay
				Squire

The following show some transactions wherein sales were confirmed:

Logan & Bryan
Commission Merchants
No. 2 Board of Trade
Chicago, 12-27-1911.

E. C. & H. E. Morrow,

.....

We have this day *sold* for your account:

All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Board of Trade of the City of Chicago and the rules, regulations and requirements of its board of directors, and all amendments that may be made thereto.

Quantity.	Delivery.	Article.	Price.	To Whom Sold.
10	May	W	98⅝	Wing
10	"	"	99	Bartlett Scott

But it is to be observed that these transactions were all negotiated by Logan & Bryan, as brokers for E. C. & H. E. Morrow, and the contracts when made were between the persons named in the confirmations as sellers or buyers, and the said E. C. & H. E. Morrow. The customers of E. C. & H. E. Morrow were not known on the Board of Trade, and could not be under rule XLV. Nor were they known to Logan & Bryan. This was admitted in substance in Mr. Dillion's testimony, wherein he said, referring to a deal or deals em-

bracing 10,000 bushels of May wheat at 98¾: "Logan & Bryan, they don't know whom we are trading for; it is all done in our name, the customers, of course. I mean that it is all done; that is King, Farnum & Co., they take our contract in Chicago; if I have five on one order and five on another, they bunch it, and they give us a confirmation for each trade."

It is apparent, therefore, that no contracts were negotiated on the Board of Trade for the benefit of E. C. & H. E. Morrow's customers. The contracting parties were E. C. & H. E. Morrow to confer any legal or equitable right in these contracts on any person not a member of the Board of Trade, with certain exceptions mentioned in rule IV, which do not apply to this case. An open attempt on their part to effect contracts on the floor of the Board of Trade for the benefits of Coles, or any other person not a member of the board would not have been recognized by the Board of Trade, and could not have been under rule XIV. An indirect attempt, by taking the contracts in their own names, could not be more successful.

The contracts, therefore, when taken, were not, in law, for the benefit of their customers, but their own contracts, and the testimony of E. C. & H. E. Morrow that their customers through them as agents bought or sold grain on the Chicago Board of Trade for future delivery, or otherwise, must go for naught.

It is true they attempted to put that face on their transaction when dealing with their customers. Although all of the deals as stated were made in their

own name, so wired to Chicago, and so confirmed back from Chicago, they upon receiving such confirmation sheets issued to each customer a paper in the form of a confirmation, of which the following to Coles is a sample:

New York Stock Exchange.
Chicago Board of Trade.
New York Cotton Exchange.
New York Coffee Exchange.
St. Louis Merchants Exchange.
E. C. & H. E. Morrow,
Brokers,
205 Third Avenue North,
Members
New York Cotton Exchange,
Chicago Board of Trade.

Nashville, Tenn., Dec. 21, 1911.

I. G. Coles,
Nash.

We have this day *bought* for your account:
All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Board of Trade of the City of Chicago and the rules, regulations and requirements of its Board of Directors, and all amendments that may be made thereto.

Quantity.	Delivery.	Article.	Price.	Of Whom Bought.
5 M	May	Wht	98⅜	

The following in case of a sale:

New York Stock Exchange.
Chicago Board of Trade.
New York Cotton Exchange.
New York Coffee Exchange.
St. Louis Merchants Exchange.

E. C. & H. E. Morrow,
Brokers,
205 Third Avenue North,
Members
New York Cotton Exchange,
Chicago Board of Trade.

Nashville, Tenn., Dec. 27, 1911.

I. G. Coles,
Nash.

We have this day *sold* for your account:

All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Board of Trade of the City of Chicago and the rules, regulations and requirements of its board of directors, and all amendments that may be made thereto.

Quantity.	Delivery.	Article.	Price.	To Whom Sold.
5 M	May	Wheat	98§	

They could not, however, as we have just said, by these papers or otherwise, give their customers any interest in the contracts, any rights in contracts limited by their express terms to members of the Board of Trade. If such right could be transferred, and enforced in violation of the rule XIV, the whole scheme

of the organization would be disarranged, and such confusion would be introduced that in no long time its purposes would be wholly frustrated. We might, in order to show this more fully, go into an analysis of the plan of the organization as disclosed in its rules, made under the authority of its charter, but, aside from the great length to which such analysis would extend this opinion, we deem it unnecessary.

The contracts then were at all times the property of E. C. & H. E. Morrow. We shall now state how they dealt with their customers in respect of these contracts.

Take the case of Coles. When he gave the so-called order to Dillion, say for the purchase of 5,000 bushels of wheat, no matter what price, he was required to pay to E. C. & H. E. Morrow three cents on each bushel, say $150 as a "margin." This was in the nature of a security against the decline of the wheat below the price at which E. C. & H. E. Morrow were to buy it on the floor of the Exchange. If the price went off so as to consume the margin, Coles was called upon to put up an additional amount. So, in case the deal were in the form of a sale of wheat, and the market advanced to such an extent as to consume the margin, he was called upon to margin the deal again. In case he failed to do so, when the deal was in the form of a purchase of grain, defendants, E. C. & H. E. Morrow, had this specific deal closed out on the Board of Trade, by causing to be sold an equal number of bushels of grain at the then market price, and charged Coles

with the difference between the price at which the supposed purchase was made and the subsequent sale at market price. A similar proceeding was had in case the deal were in the form of a sale, and the dfference between sale price and market price at the time of default ascertained. In a purchase contract when the market advanced over the purchase price, if the customer, say Coles, wished the deal closed out by sale, this was done, and the profit shown by the difference between the purchase price and the price realized at the subsequent sale was credited to him. So, in case the deal were in the form of a sale of grain, and the market price declined below the contract price, Coles could ask the defendants to close the deal, and they would do so, and the difference would be credited to him as profit.

In this manner Coles speculated in the rise and fall of the market, settling always by differences. He testified that he had no thought or purpose, in any case of either making or accepting delivery of the grain represented by the contracts. We may add that he had no power under the rules of the Board of Trade to do either, because he was not known there, and, as we have already pointed out, had no interest in the contracts. We may further state that the rules of the board contain most elaborate provisions on the subject of delivery, and all of them contemplate delivery by one member of the board to another member, on the floor of the Exchange, in a specified symbolic form,

of warehouse receipts, etc. Coles was no member, and he could have neither made nor accepted a delivery, and, as stated, he never contemplated such a thing. It is equally certain that C. E. & H. E. Morrow never themselves contemplated either making or receiving a delivery of grain on any of these contracts; that is, that they themselves would make any delivery of grain, or receive any. Where a change in the market, up or down, showed a profit on any of the contracts which E. C. & H. E. Morrow had made on the initiative of any of their customers, and such contracts were cashed at such profit, of course no question arose between them and their customers. But the testimony shows that when a loss was imminent, the margin had been consumed, and the customers declined to put up additional margin, in every instance the Morrows closed the deal, and charged the customer with the difference. C. E. & H. E. Morrow never in any such case contemplated or expected delivering or accepting delivery of the property; that is, on any such contracts. initiated by their customers. They and Coles were simply using the deals as counters to speculate in the rise and fall of the market; the differences to be ascertained in the manner already mentioned. This was a pure gambling transaction. We have no doubt, it is true, that, had any of the customers of E. C. & H. E. Morrow desired to make or accept a delivery on any contract initiated by such customers, though in the name of the said Morrows, and legally belonging to them only, the latter would have seen to it that proper

facilities were provided to that end, in their own name if the customers furnished the money. But we do not conceive that this fact would in the least divert the application of the legal principles controlling the controversy. It would not add a legal *status* to the course of dealing previously existing between Coles and the two Morrows. It would not transmute these illegal dealings into the lawful contracts had between C. E. & H. E. Morrow, and other members of the Board of Trade of Chicago.

Defendants say they had no interest in the deals except the commissions they expected to realize out of them, one half of $7.50 on each 5,000 bushels of grain involved, the other half going to Logan & Bryan. Concede it as true that all they expected to realize on the deals was the commissions, and that this was all they did realize. Still the deals were all their own. They were conducting a gambling business, and they must, under the law, repay the money received by them in the conduct of such illegal business; and it is immaterial whether they kept the money themselves, or turned it over to some other.

In this view it is unnecessary that we discuss the question whether chapter 251, Acts of 1883, is repealed by chapter 277, Acts of 1909.

We are of the opinion that the chancellor charged defendants in the *Morgan Case* with $1,362.49 in excess of the true amount. It is true that when Morgan entered upon the series of transactions which he subsequently conducted with defendants they gave him

credit by an item of $2,194 taken over from Thomas Plater & Co. This, however, represented a deal or deals Plater & Co. had made for Morgan, and out of these deals only $831.51 in cash was received by defendants. The item of $2,194 should therefore be reduced to that extent, leaving due in the *Morgan Case*, after deducting a credit of $115, the sum of $3,777.51 with interest.

The action in the *Morgan Case* was brought by his children, under Shannon's Code, section 3162, which reads as follows:

"Any other person may, after the expiration of the ninety days, and within twelve months thereafter, recover the amount of such money, thing, or its value, by action for the use of the wife; or, if no wife, the child, or children; and if no child or children, the next of kin of the loser."

It is shown the children were not minors, and it is therefore insisted that the suit could not be brought by them. There is no such restriction in the statute, and we cannot insert it. This objection must therefore be overruled.

It results that the decree of the court of civil appeals in the *Coles Case* must be affirmed; and the decree of the chancellor in the *Morgan Case*, after modification, as above indicated, must also be affirmed, with interest from the date of the chancellor's decree.

PUCKETT *v.* GRIFFITH *et al.*

(*Nashville.* December Term, 1913.)

1. **JUSTICES OF THE PEACE. Execution. Entry of stay. Power to modify.**

An attempt made by a justice of the peace, after expiration of the three-day period allowed by law, to change the entry of a stay of execution so as to make it applicable on its face only to the principal judgment debtor was ineffective. (*Post*, *p.* 568.)

Cases cited and approved: Mayfield v. McLary, 40 Tenn., 160; Apperson v. Smith, 37 Tenn., 372; Howard v. Brownlow, 36 Tenn., 548.

2. **JUSTICES OF THE PEACE. Execution. Entry of stay. Effect as judgment.**

Entry of a stay of execution by a justice of the peace was equivalent to a confessed judgment against the stayor. (*Post*, *p.* 568.)

Cases cited and approved: Roberts v. Cross, 33 Tenn., 233; Apperson v. Smith, 37 Tenn., 372.

3. **JUSTICES OF THE PEACE. Execution. Stay. Liability of stayor.**

Under Shannon's Code, sec. 4788, authorizing a justice of the peace to enter security for stay of execution, and section 4789 providing that one who becomes stayor at the instance of the principal defendant is liable before a surety, a person who caused his name to be entered broadly as stayor was liable before the sureties, where the stay as to them was unauthorized and promptly disaffirmed by them, though he was induced to become stayor by the principal debtor's false representation that the sureties desired that the judgment be stayed. (*Post*, *p.* 530.)

Code cited and construed: Secs. 4788, 4789 (S.).

Cases cited and approved: Chaffin v. Campbell, 36 Tenn., 184; Holt v. Davis, 40 Tenn., 629; Higg v. Landrum, 41 Tenn., 81; Gant v. White, 62 Tenn.. 196.

4. **JUSTICES OF THE PEACE. Entry of stay. Operation and effect.**

Where the name of a stayor is entered by a justice of the peace without any qualification, *prima facie* he is stayor for both the principal judgment debtor and his sureties, but he may be shown to be in reality the stayor of the principal only. (*Post*, *p.* 571.)

Case cited and approved: Woodward v. Wilton, 54 Tenn., 50.

5. **JUDGMENT. Setting aside. Grounds.**

To justify a court of equity in setting aside a judgment at law, the complainant must prove not only fraud but that it was unmixed by any fault attributable to him, such as neglect or inattention. (*Post*, *pp.* 571, 572.)

Cases cited and approved: McDowell v. Morrel, 73 Tenn., 279; Maddox v. Apperson, 82 Tenn., 596.

6. **JUDGMENT. Bill to set aside. Laches.**

Where it appeared that the complainant, in a suit to set aside, for fraud in procurement, the entry of his name as stayor of a judgment rendered by a justice of the peace, made no effort to ascertain from the sureties of the principal debtor whether they desired him to become stayor, and that the sureties promptly disaffirmed the stay, complainant, by reason of his inattention, was not entitled to have the judgment set aside. (*Post*, *p.* 572.)

FROM DEKALB

Appeal from the Chancery Court of DeKalb County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—A. H. ROBERTS, Chancellor.

DRAKE & TURNER, for complainant.

T. W. WADE, for defendant Griffith.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

G. C. Puckett filed a bill of complaint seeking to have set aside, for fraud in procurement, the entry of his name as stayer of a judgment rendered by a justice of the peace. This judgment was based on a note on which one Cantrell was principal and Griffith and Allen were sureties. Within the time allowed by law, Cantrell, the principal judgment debtor, went to complainant Puckett and requested him to become stayor of that judgment. Puckett declined to stay for Cantrell alone, whereupon Cantrell told Puckett that the two sureties, as well as himself, desired that the judgment be stayed. Puckett, knowing that the sureties were solvent, agreed to stay the judgment for all the defendants and instructed the justice to so enter his name as stayor. The justice entered his name, "G. C. Puckett, stayor."

Promptly on learning that Puckett had attempted to stay the judgment for them, as well as their principal, the sureties sent word to the justice that they did not want the judgment stayed in their behalf, and the justice, after the lapse of the three days allowed for stay, undertook to change and add to his entry on the record so as to make it show, "G. C. Puckett, stayor for Cantrell." This change was without the knowl-

edge or consent of Puckett, and he did not learn of it until after the eight months' stay period had expired.

The sureties, Griffith and Allen, had not authorized or requested Puckett to become stayor for them; and the latter made no inquiry of them as to their real desires in that regard.

The sureties were compelled to pay the judgment, and, deeming the stayor to be primarily liable, they brought suit at law against Puckett to recover; and this action was enjoined by fiat issued under the bill of complaint, which bill also, as noted, sought to have declared null the judgment of stay.

The attempt of the justice of the peace to change the entry of stay was ineffectual because of lack of power on his part. The period of three days allowed by law for authorized action in that respect had expired, and the words added by him, "for Cantrell," must be treated as nonexistent. *Mayfield* v. *McLary,* 3 Head, 160; *Apperson* v. *Smith,* 5 Sneed, 372; *Howard* v. *Brownlow,* 4 Sneed, 548.

The original entry of stay, "G. C. Puckett, stayor," was in legal effect the equivalent of a confessed judgment against the stayor. *Roberts* v. *Cross,* 1 Sneed, 233; *Apperson* v. *Smith,* supra.

By statute it is provided that: "It is not lawful for the justice to enter security for the stay of execution for any defendant bound as surety or indorser on the original debt, where the security is offered by the principal, unless the defendant assents in proper person

or by writing, signed by him, and showing that the stayor is entered as such at his instance and request." Code, Shannon, sec. 4788.

Further: By section 4789, one who becomes stayor at the instance of the principal defendant is liable before the surety. *Chaffin* v. *Campbell,* 4 Sneed, 184; *Holt* v. *Davis,* 3 Head, 629.

While it was held in *Higgs* v. *Landrum,* 1 Cold., 81, that the justice, in entering the stay, should state specifically upon his docket how the fact was in respect of the assent of the surety and of its manifestation in proper person or by a writing signed by him, this decision has been explained to be merely directory on the point, and it was held that by Code, Shannon, section 4788, it was not intended, in order to validity, to require the justice to act only on the surety's application in person or signed written authorization; and that such official is authorized, notwithstanding the statute, to act on such evidence of assent on the part of the surety as satisfies him. *Gaut* v. *White,* 3 Baxt., 196.

When, therefore, the name of a stayor is entered broadly or without any such qualification, *prima facie* he is stayor for all parties; but he may be shown to be, in reality, the stayor of the principal only. *Woodward* v. *Walton,* 7 Heisk., 50. In the case before us it is admitted that Puckett did not become stayor in behalf of the sureties.

The court of civil appeals was of opinion: "That complainant Puckett did not become bound as stayor

for anyone. He had a right to say that he would stay for certain parties only; and the justice of the peace had no authority to enter his name for any other or others than those he named. True, he had no authority to enter it as stayor for all the parties, as they had not all consented, but that does not help the sureties, as, under Puckett's directions, he had no authority to enter it for less than all. The result was that he had no authority to enter it at all. His effort to render judgment against Puckett as stayor, contrary to the authority given him, was simply a nullity."

The argument of the court of civil appeals proceeds upon the basis that the justice of the peace had no authority to enter the name of Puckett as stayor for all the judgment defendants, as they had not all consented. This confuses the sources of authority. The justice did have authority to so enter the name of Puckett from Puckett himself, at the time given. The entry was in the form and to the effect intended by Puckett, and therefore authorized. The authority that was lacking was that to Puckett from the sureties. If Puckett acted under a mistake or was misled as to the persons for whom he was authorized to give the benefit of his name in suretyship, that mistake was personal. It was not known to the justice; nor did it operate as an influence upon the judicial act when the justice rendered the confessed judgment against Puckett as stayor.

It does not follow that, if Puckett so lacked authority from the sureties, the confessed judgment of stay fails

in toto. Authorities, supra. Any other rule would leave out of view the just rights of the judgment plaintiff and place it in the power of the judgment defendants and a stayor by collusion so to manipulate that such plaintiff would be subjected to the delay incident to a stay, without a countervailing firm assurance of the security supposedly augmented by the stay. The judgment plaintiff would bear the burden of delay and yet be permitted to be cheated of the only compensating benefit.

Another contention of complainant is that there was a fraud perpetrated by the principal judgment debtor, Cantrell, by way of misrepresentation, that induced his assent to stay the judgment, and that a court of equity should set aside the judgment of stay on that ground. This would bring up for consideration the interesting questions: (1) Whether any other than the judgment plaintiff in such confessed judgment may be the adverse party whose fraud could be complained of; and (2) whether the fraud of the principal judgment debtor, if admitted, could in any event be permitted to work a change, to their detriment, in the *status* of the sureties, not participating in the fraud, as fixed when the stay was entered by complainant. But other considerations determine the result of the cause, rendering a decision on these points unnecessary.

To justify a court of equity in setting aside for fraud a judgment at law, a complainant must show not only the fraud but also that it was unmixed by any fault

attributable to him, such as neglect or inattention. *McDowell* v. *Morrell,* 5 Lea, 279; *Maddox* v. *Apperson,* 14 Lea, 596. And this by reasonably clear and cogent proof.

The court of civil appeals did not base its decree on the ground of such fraud, if, indeed, it could have done so, in view of the fact that the principal judgment debtor did not even represent to complainant that he was authorized to speak for the sureties and request, as upon their authority, a stay in their behalf. The bill alleged only that Cantrell's representation to complainant was that it was the desire of the sureties that the judgment be stayed, and that complainant agreed to stay for all parties.

Going now, more particularly, to the other phase: Complainant did not make any effort to ascertain from the sureties whether they solicited him through Cantrell to become a stayor for them; and promptly, on learning of the situation developed by the broad entry of stay, the sureties were active to disaffirm, as we have seen above. Complainant, thus inattentive, has failed to show himself entitled to invoke the exercise of equity's power to set aside such a judgment as fraudulent. Writ of *certiorari* allowed; and decree here in accord.

HARRIS *et al. v.* NASHVILLE TRUST CO.

(*Nashville.* December Term, 1913.)

1. **ABATEMENT AND REVIVAL. Survival of causes of action. Libel.**

An action may be maintained against an executor as such for damages from a libel contained in a will published by the probate thereof, the maxim, "*Actio personalis moritur cum persona*" not applying, since the right of action did not exist in the lifetime of the testator. (*Post*, *p.* 577.)

Cases cited and approved: McGhee v. Baumgartner, 121 Mich., 287; Allen v. Pioneer Press Co., 40 Minn., 117; Osborn v. Leach, 135 N. C., 628.

2. **LIBEL AND SLANDER. Libelous words. Charge of illegitimacy.**

It is libelous *per se* to charge one in print or writing with being illegitimate. (*Post*, *p.* 578.)

Cases cited and approved: Shelby v. Sun Printing, etc., Assn., 38 Hun (N. Y.), 474; Mix v. North American Co., 12 Pa. Dist. R., 446.

3. **EXECUTORS AND ADMINISTRATORS. Actions.**

Where a libel contained in a will was published by the probate thereof, the testator, and not the executor, was liable, since a principal is responsible where authority is given to an agent to publish libelous words, and the publication is made in substantial accord with such authority and the publication by the executor was in literal pursuance of the authority given; it being his duty to probate the will. (*Post*, *pp.* 578, 579.)

Code cited and construed: Sec. 6565 (S.).

Cases cited and approved: Dawson v. Holt, 79 Tenn., 583; Wilson v. Noonan, 27 Wis., 598; Adams v. Kelly, 1 Ry. & M., 158; Bacon v. Mich. Central R. Co., 55 Mich., 224; Smith v. Harrison, 49 Tenn., 230; Douglass v. Baber, 83 Tenn., 651.

4. TORTS. Right of action.

That no precedent can be found for an action in tort, though to be considered, will not of itself prevent relief; the determinative question being whether a wrong has been inflicted for which plaintiff is entitled to recover lawful damage. (*Post*, *p.* 579.)

Cases cited and approved: Kujek v. Goldman, 150 N. Y., 176; Rice v. Coolridge, 121 Mass., 393; Jacob v. State, 22 Tenn., 493.

5. LIBEL AND SLANDER. Publication. Republication.

The probate of a will was a publication of a libel contained therein sufficient to sustain a suit even if, as claimed, there was a publication thereof during the testator's lifetime by the dictation of the will to a stenographer. (*Post*, *p.* 580.)

6. ABATEMENT AND REVIVAL. Survival of causes of action.

The maxim, "*Actio personalis moritur cum persona*," is based upon no very satisfactory reason, and is not favored by the courts. (*Post*, *p.* 581.)

Case cited and approved: Hambly v. Trott, 1 Cowp., 373, 98 Eng. Reprint, 1136 in 1776.

Cases cited and disapproved: Finley v. Chirney, 20 Q. B. D., 494, 508; Hyatt v. Adams, 16 Mich., 180.

7. ABATEMENT AND REVIVAL. Survival of causes of action. Statutory provisions.

Shannon's Code, sec. 4569, provides that no civil action commenced whether founded on wrongs or contracts, "except actions for wrongs affecting the character of the plaintiff" shall abate by the death of either party, but may be revived. *Held*, that the exception as to wrongs affecting the character of plaintiff did not defeat an action based on a libel contained in a will first published after the testator's death, as that action relates only to actions commenced during the lifetime of the deceased party. (*Post*, *pp.* 585, 586.)

Code cited and construed: Sec. 4569 (S.).

Cases cited and approved: Dayton v. Lynes, 30 Conn., 351; Napier v. Trimmer, 56 Ga., 300; Frost v. Tarr, 53 Ind., 390;

Lee v. Carter, 52 Ind., 342; Bell v. Hewitt, 24 Ind., 280; Baker v. Syfritt, 147 Iowa, 49; McGuire v. McGuire, 11 Bush. (Ky.), 142; Freel v. Freel, 7 Ky. Law Rep., 288; Jenkins v. Stetson, 9 Allen (Mass.), 128; Sword v. Keith, 31 Mich., 247; Clark v. Cordry, 69 Mo. App., 6; Cullen v. Woolverton, 65 N. J. Law, 279; Van Horn v. Demarest, 76 N. J. Eq., 386; Andrews v. Brewster, 124 N. Y., 433; Whitcomb v. Whitcomb, 92 Hun, 443, 36 N. Y. Supp., 607; Sherman v. Scott, 27 Hun (N. Y.), 331; Burgess v. Burgess, 109 Pa., 312.

FROM DAVIDSON.

Appeal from Circuit Court, Davidson County.—THOS. E. MATHEWS, Judge.

STOKES & STOKES, for plaintiffs.

PARKS & BELL, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought by Mrs. Cleo Woodfin Harris, joined by her husband, F. H. Harris, to recover damages from the Nashville Trust Company, executor of R. H. Woodfin, on account of a libel against the plaintiff contained in testator's will and published by the probate of said will in Davidson county.

A motion to dismiss, which was treated by the parties as a demurrer, was filed in the trial court and

there sustained. The court of civil appeals reversed the action of the trial judge, overruled the demurrer, and remanded the case for further proceedings. The case is before us on petition for *certiorari* granted to the action of the court of civil appeals.

The declaration avers that the plaintiff Cleo Woodfin Harris was the niece of testator, R. H. Woodfin; that prior to the death of the latter, she had instituted suit against her uncle, the said Woodfin, to recover her interest in her grandmother's estate in the hands of decedent; that thereafter, actuated by malice, and with the intention of defaming her character and reputation, the said Woodfin added a codicil to his will containing the following language:

"And this sum of two hundred and fifty (250) dollars to John Woodfin, $1 to William Woodfin, and $1 to Cleo Woodfin, *the illegitimate children of my brother James Woodfin,* is all that they are ever to have of my estate."

The declaration further sets out that the testator died during the year 1910, and that his will, with the aforesaid codicil, was duly probated in the county court of Davidson county, and defendant, the Nashville Trust Company, qualified as the executor thereof.

It was averred by the plaintiff that she was the lawful child of her parents, the mother of several children, and that said codicil was maliciously added to his will by the testator in order to blacken her character and that of her offspring, and that, said libel being published by the probate of said will as aforesaid, she

accordingly sued the executor to recover damages in the sum of $20,000.

The principal question raised by the demurrer below was on the right of plaintiff to maintain this action *ex delicto* against the executor for testator's tort. The circuit judge was of opinion that the maxim, "*Actio personalis moritur cum persona,*" was controlling and dismissed the suit. As said before, the court of civil appeals took the opposite view.

If we leave out of consideration the maxim referred to, and its effect on the rights of these parties, there seems to be no reason why this action cannot be maintained.

A tort has certainly been committed with respect to the rights of this plaintiff.

The enjoyment of private reputation *unassailed* is a right entitled to the protection of the law and of the constitution as much as are the rights to the possession of life, liberty, or property. *McGhee* v. *Baumgartner,* 121 Mich., 287, 80 N. W., 21; *Allen* v. *Pioneer Press Co.*, 40 Minn., 117, 41 N. W., 936, 3 L. R. A., 532, 12 Am. St. Rep., 707; *Osborn* v. *Leach,* 135 N. C., 628, 47 S. E., 811, 66 L. R. A., 648.

To traduce one's private reputation—to invade the enjoyment of this reputation—is, of course, a breach of the legal duty one owes to another, and is a tort for which an action will lie. If such a wrong be committed by written words, upon publication of such writing, an action for libel at once accrues to the party injured.

It is libelous *per se* to charge one in print or writing with being illegitimate, and no special damages need be averred in a declaration founded on a libel of this character. 25 Cyc., 264; *Shelby* v. *Sun Printing, etc., Assn.*, 38 Hun (N. Y.), 474; *Mix* v. *North American Co.*, 12 Pa. Dist. R., 446.

No more effective means of publishing and perpetuating a libel can be conceived than to secure the inscription of such matter on court records, as by probate of a will. The libel is not only permanently recorded, but in this case will be of widespread circulation for many years. This testator was the owner of considerable real estate, and every time a transfer of any of this property is made and an examination of the title necessitated, this will must be scrutinized, and the libel thus published will be called to the attention of parties interested. The stigma placed by testator upon this plaintiff and her descendants will be thus made conspicuous for years to come.

It is well settled that a principal is responsible where authority is given to an agent to publish libelous words and a publication is made by the agent in substantial accord with his authority. *Dawson* v. *Holt*, 11 Lea, 583, 47 Am. Rep., 312; *Wilson* v. *Noonan*, 27 Wis., 598; *Adams* v. *Kelly*, 1 Ry. & M., 158; *Bacon* v. *Mich. Central R. Co.*, 55 Mich., 224, 21 N. W., 324, 54 Am. Rep., 372.

The publication of this libel was made by the agent the executor, in literal pursuance of the authority given; that is to say, it was made by the probate of

testator's will. It was of course the duty of the executor to probate this will, and for a suppression thereof criminal accountability would have followed. *Smith* v. *Harrison,* 2 Heisk., 230; *Douglass* v. *Baber,* 15 Lea, 651; Shannon's Code, sec. 6565.

It is not a case, therefore, in which the agent, the executor, should be held to any liability, but if liability exists, the principal should be responsible.

Although the action is without precedent, it should not be defeated upon that ground alone if it can be sustained upon sound principles of law.

While the fact that no precedent can be found for an action in tort is to be considered, the novelty of the proceeding will not of itself prevent relief. Every action in tort based upon a particular act or omission, when brought for the first time, is without a precedent. The determinative question, therefore, is whether a wrong has been inflicted for which plaintiff is entitled to recover lawful damage, and not whether there is a precedent for the suit. 38 Cyc., 423; *Kujek* v. *Goldman,* 150 N. Y., 176, 44 N. E., 773, 34 L. R. A., 156, 55 Am. St. Rep., 670; *Rice* v. *Coolridge,* 121 Mass., 393, 23 Am. Rep., 279.

Speaking of the common law, this court has said:

"Though principles, when established by judicial determination, can only be changed by legislative enactment, yet such is its malleability (if we may use the expression) that new principles may be developed, and old ones extended by analogy, so as to embrace newly created relations and changes produced by time

and circumstances. Such it is, in Great Britain, at the present moment; such it was when we adopted it, and such it now is with us." *Jacob* v. *State*, 3 Humph., 493.

To return now to consideration of the maxim, "*Actio personalis moritur cum persona.*" Translated and grammatically confined, this principle does not touch the present case. To say that an action dies with the person, or as Lord Mansfield has rendered it, "is buried" with the person, implies that the cause of action existed in the lifetime of the person; that it was existing while the person lived and abated with his death.

The right of action here asserted never had any existence during the lifetime of the deceased, Woodfin. It did not accrue until the publication of the libel, made by the probate of the will, after testator's death. If, as insisted by counsel for the executor, there was a publication of this libel during Woodfin's lifetime by dictation of the will to a stenographer, still, this is not the publication complained of in this suit. The suit is founded on the republication of the libel by the probate of the will. "A substantial reiteration of a prior defamatory publication by defendant amounts to a republication, for which he will be responsible." 25 Cyc., 370.

So the tort upon which this suit is based was not committed until after the death of Woodfin. This right of action arose after Woodfin's death, and could not

have been buried with him. The case therefore falls without the letter of the old rule.

The maxim, "*Actio personalis moritur cum persona,*" is by no means a favorite with the courts. It has no champion at this date, nor has any judge or law writer risen to defend it for 200 years past.

Its origin, as said by Bowen, L. J., in *Finley* v. *Chirney*, 20 Q. B. D., 494, 508, is "obscure and postclassical." It is said by a great commentator to be barbarous, and to rest on adjudication in fact. Pollock on Torts, 53.

Mr. Jaggard, in his work on Torts, vol. 1, p. 328, says that all the reasons that have been given for the rule are unsatisfactory, if not absurd.

Mr. Tiffany in the last edition of his Death by Wrongful Act reviews the cases which undertake to give a reason for this maxim, and rejects all of them as insufficient. He concludes with a quotation from the New York court: "It is of no practical utility to search for the reason of the rule; it remains somewhat obscure. *Green* v. *Hudson River R. Co.*" Tiffany on Death by Wrongful Act, section 16 and preceding sections.

The supreme court of Michigan says: "The rule rests more on artificial distinction than any real principle, and savors more of the logic of the schoolman than of common sense." *Hyatt* v. *Adams,* 16 Mich., 180.

Quotations might be multiplied from the cases and from text-writers in accord with the foregoing, but

it is sufficient to say that no reason has ever been assigned for the existence of this rule which would satisfy an enlightened court of modern times.

As pointed out in the case of *Finley* v. *Chirney*, 20 Q. B. D., 494, personal actions of almost every character were held to abate upon the death of the parties, in the early times of English Law. "Survival of causes of action was the rare exception. Nonsurvival was the rule."

The English courts, however, many years ago began to make exceptions to the operation of the rule embodied in the maxim here under discussion. The cases were reviewed by Lord Mansfield in *Hambly* v. *Trott*, 1 Cowp.. 373, 98 Eng. Reprint, 1136, in 1776, and he said, speaking of these cases:

"I think these conclusions may be drawn from them:

"First. As to actions which survive against an executor or die with the person on account of the cause of action. Secondly, as to actions which survive against an executor or die with the person on account of the form of action.

"As to the first, where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labor, or property, of another, or a promise of the testator, express or implied—where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises *ex delicto* (as is said in Sir T. Raym. 57, *Hole* v. *Blandford*), supposed to be by force and against the King's peace, there the action

dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a watercourse, escape against the sheriff, and many other cases of the like kind.

"Second, as to those which survive or die in respect of the form of action. In some actions the defendant could have waged his law, and therefore no action in that form lies against an executor. But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action where in form the declaration must be "*quare vi et armis, et contra pacem,*" or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record, the cause of action arises *ex delicto;* and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender."

The extent of the rule has been limited by cases subsequent to *Hambly* v. *Trott.* It would not be profitable to review such decisions here, for aside from the cases, there are now statutes in all jurisdictions where the common law prevails providing for the survival of nearly every form of action.

In Tennessee it is provided that no action shall abate save those "for wrongs affecting the character of the plaintiff." Shannon's Code, 4569.

The tendency, therefore, has all the while been by decision and by statute to limit and circumscribe the effect of the rule that actions abate by the death of the parties thereto. There is no case to be found with-

in the last two centuries in which the scope of this rule has been extended or broadened.

As illustrating the disposition of modern courts, we refer to the case of *Dayton* v. *Lynes*, 30 Conn., 351, where a deputy sheriff committed a default in his office and the party injured brought an action on the case for damages against the sheriff. The sheriff died while this action was pending, and "*Actio personalis moritur cum persona*" was invoked by his executor. The court, however, held that this maxim did not apply to a case where the tort out of which the action grew was the tort of a third party and not the tort of the deceased.

So we are unwilling to apply the rule relied on by the executor in this case. The rule excludes this case from its operation by its very terms. As we have seen, it indicates as within its meaning only those causes of action which had accrued prior to the death of the person. We would not be justified in disregarding the ordinary laws of grammatical construction to widen the scope of a well-nigh discredited maxim like this one.

There is nothing novel or unusual in a suit against an executor in his official capacity, based upon a provision of testator's will.

For instance, a testator may, during his lifetime, make a valid contract to dispose of property by will in a particular way. If he fails to make such a disposition of the property, or makes a different disposition of the property by his will, the executor is liable to

suit for breach of the testator's contract. *Napier* v. *Trimmier,* 56 Ga., 300; *Frost* v. *Tarr,* 53 Ind., 390; *Lee* v. *Carter,* 52 Ind., 342; *Bell* v. *Hewitt,* 24 Ind., 280; *Baker* v. *Syfritt,* 147 Iowa, 49, 125 N. W., 998; *McGuire* v. *McGuire,* 11 Bush (Ky.), 142; *Freel* v. *Freel,* 7 Ky. Law Rep., 288; *Jenkins* v. *Stetson,* 9 Allen (Mass.). 128; *Sword* v. *Keith,* 31 Mich., 247; *Clark* v. *Cordry,* 69 Mo. App., 6; *Cullen* v. *Woolverton,* 65 N. J. Law, 279, 47 Atl., 626; *Van Horn* v. *Demarest,* 76 N. J. Eq., 386, 77 Atl., 354; *Andrews* v. *Brewster,* 124 N. Y., 433, 26 N. E., 1024; *Whitcomb* v. *Whitcomb,* 92 Hun, 443, 36 N. Y. Supp., 607; *Sherman* v. *Scott,* 27 Hun (N. Y.), 331; *Burgess* v. *Burgess,* 109 Pa., 312, 1 Atl., 167; *Cottrell's Estate,* 11 Phila. (Pa.), 92.

By the grace of the law a man is allowed to control the disposition of property after his death and to do many other things by will. He is thus allowed to project his individuality, his grasp, and his desires, beyond the grave, and make them effective. If by will he breaches his contract, this executor and his estate are made to respond. If by will he commits a tort there seems to be no good reason why his executor and his estate should not likewise be held accountable. With the maxim, "*Actio personalis moritur cum persona,*" out of the way, there is no good reason, and we have seen that this maxim does not touch this case.

If relief be denied to this plaintiff in this suit, she is indeed in bad plight. There is no other way in which she may vindicate the virtue and integrity of her mother and establish for herself the position in so-

ciety which she is entitled to occupy. If relief be denied to her, she, during her lifetime, and her children for generations, must bear the reproach of the bar sinister. It cannot be said that the law affords no remedy for a wrong such as the one perpetrated by this testator.

The maxim relied on by the executor has no application to the facts of this case, nor does any other principle of the law to which our attention has been called stand in the way of plaintiff's recovery.

The exception of suits founded on wrongs against the character from the statutory provision against abatement by death is no bar to plaintiff's action, because the statute relates to suits "commenced" during the life of the party deceased. Shannon's Code, 4569.

Other matters arising in the case are fully considered in the opinion of the court of civil appeals, and the judgment of that court is here affirmed, and the cause remanded for further proceedings.

NASHVILLE RAILWAY & LIGHT CO. *v.* DUNGEY.

(*Nashville.* December Term, 1913.*)

1. **TRIAL. Instructons. Burden of proof.**

In a personal injury action, where the court charged that the burden of proof was on plaintiff by reason of defendant's plea of not guilty, the giving of another charge, setting out the contentions of both parties as to the nature of the accident and stating that, if defendant's version was true, verdict should be for it, places the burden of proving the truth of his theory on defendant. (*Post*, *pp.* 589, 590, 591.)

2. **TRIAL. Instructions. Burden of proof.**

In a personal injury action, a charge, which set out the contentions of both of the parties and stated that if defendant's version was true, verdict should be for it, is improper because imposing on defendant the burden of proving its defense beyond reasonable doubt. (*Post*, *pp.* 592, 593.)

Case cited and distinguished: McBee v. Bowman, 89 Tenn., 136.

3. **APPEAL AND ERROR. Review. Harmless error.**

Notwithstanding the provisions of Acts 1911, ch. 32, providing that no judgment shall be set aside for any error not affecting the result of the trial, the giving of an instruction, in a personal injury action against a street railway company, outlining defendant's theory of the accident and charging the jury that if they should find it to be true to find for defendant, is so prejudicial as to necessitate a reversal, particularly where other instructions authorized a finding for plaintiff on a slight preponderance of evidence and the statute declaring defendant's liability for its negligence was read to the jury, without qualification. (*Post*, *pp.* 595, 596.)

Acts cited and construed: Acts 1911, ch. 32.

Code cited and construed: Shan. Code, sec. 2406.

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*Received for Publication February 25, 1914.

Cases cited and approved: Chapman v. McAdams, 69 Tenn., 500; McBee v. Bowman, supra; Gage v. Railroad Co., 88 Tenn., 726; Wilcox v. Hines, 100 Tenn., 524; Knights of Pythias v. Steele, 107 Tenn., 1.

FROM DAVIDSON.

Appeal from Circuit Court of Davidson County to the Court of Civil Appeals, and by writ of *certiorari* from the Court of Civil Appeals to the Supreme Court. —THOMAS E. MATHEWS, Judge.

J. M. ANDERSON, for plaintiff.

LAURENT BROWN, for defendant.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

This was an action based on personal injuries and damage to plaintiff's ice wagon, and was brought in the circuit court of Davidson county against the Nashville Railway & Light Company. Plaintiff had judgment in the circuit court in the sum of $1,000, which was affirmed by the court of civil appeals, and the case is here on defendant's petition for *certiorari.*

There are three assignments of error, the last of which only will be considered.

The personal injuries complained of resulted from a collision between one of the cars of the defendant company and an ice wagon, owned and driven at the

time of the collision by the plaintiff. The declaration as on the facts of the case, and consisted of one count. The plea of defendant was not guilty.

The case turned upon a sharp conflict of fact in the circuit court; plaintiff's theory being that the car ran against the left-hand rear wheel of plaintiff's ice wagon, and defendant's theory being, as disclosed by its evidence, that the ice wagon was backed against the side of the car when two-thirds of the body of the car had passed the wagon in safety, and while the motorman was in the exercise of ordinary care.

The third assignment of error is based upon the following quotation from the charge of the court: "If the preponderance of all the evidence shows to you that this is the truth of the case, then your verdict will be in favor of the defendant."

This portion of the charge immediately followed, and was in fact the conclusion of, that part of the charge in which the court was undertaking to give the jury the defendant's theory of the facts surrounding the collision. This paragraph, which is No. 7 of the charge, begins as follows: "But the Nashville Railway & Light Company says that plaintiff's version of the accident is not true, and it contends that these are substantially the facts of the case, namely." Then follows the court's statement of the facts, which was what he told the jury as the defendant's contention.

The criticism made of the court's charge above quoted is that by it the court, in substance, said to the jury: I have stated to you what the defendant says

is the truth about this occurrence. If the preponderance of all the evidence shows to you that this is the truth of the case, then your verdict must be in favor of the defendant company.

We think the jury could have done no less than understand the quotation from the charge above set out as that quotation is just above construed; and, if the jury did so understand it, then, beyond question, the court by that portion of the charge placed upon defendant, in respect to his theory of how the collision occurred, the burden of showing the jury the truth of his theory; and, in so charging the jury, we think the learned trial judge went beyond the law. It does not answer the above criticism to say that the court in an earlier part of the charge, in explaining the pleadings, said to the jury: "The plea is not guilty. This plea admits nothing, but denies everything, and puts the burden of proof on the plaintiff; and plaintiff must prove by a preponderance of all the evidence his case substantially as he has alleged it."

In the last above quotation from the charge, the court was explaining in general terms the pleadings and the *quantum* of proof plaintiff must make in order to recover; and, assuming that the jury understood the last above quoted portion of the charge to mean that the burden of proof was on the plaintiff throughout the trial, the question which arises is, How was the jury to reconcile the two portions of the charge, in the first of which, as we have seen, they were told, in substance, that the burden of proof was on the plain-

tiff, and in the second of which they were told that the burden of proof was on the defendant? It seems to us that these conflicting portions of the charge must have left the jury in uncertainty and doubt. It is of course clear that, under its plea of not guilty, there was no burden on the defendant to show by a preponderance of the evidence the truth of its theory as to how the collision occurred. As the pleadings stood, defendant's plea of not guilty put every material averment of the declaration at issue, and placed on plaintiff the burden of the evidence; and the law placed on the trial court the duty of making it clear to the jury by its charge, without contradiction or conflict, that such burden was on the plaintiff throughout the trial, and that if, on consideration of all the evidence in the case, it failed to preponderate in favor of plaintiff, or if it was in equipoise, or if it preponderated in favor of defendant, then in any of these three events, under the law, defendant was entitled to the verdict of the jury under its plea of not guilty.

Passing now to another criticism of that portion of the charge first above quoted herein, we observe that, in the case of *McBee* v. *Bowman,* 89 Tenn. (5 Pickle), 136, 14 S. W., 483, where the court, upon the trial of an issue *devisavit vel non,* was charging the jury with respect to the *quantum* of evidence necessary to prove forgery of the will in question, and in so doing charged that the fact of forgery in a civil suit could be established "like any other issue of fact in a civil case, and that is by a preponderance of the testimony;" and,

after explaining what was meant by such preponderance, the court added these words: "A jury, before passing upon an act considered as a forgery, should do so with the full knowledge of the nature of the crime imputed and with all the facts surrounding it. It should appear with reasonable certainty that such is the case."

This court in that case held the last above-quoted part of the charge to be erroneous on the ground that it was tantamount to telling the jury that they must be convinced of the fact of forgery beyond a reasonable doubt. Upon the authority of that case, we think the same construction may be placed on that portion of the charge in the present case where the court told the jury, "If the preponderance of all the evidence shows to you that this is the truth of the case, then your verdict must be in favor of the defendant." To be sure, if the preponderance of all the evidence was such as to show or demonstrate to the jury that the truth of the case was as the court had stated to the jury that the defendant had said it was, then the jury could not have a reasonable doubt. No reasonable doubt could exist in such state of the proof, because the jury could see the truth of the case as it was shown to them by so great a preponderance of all the evidence.

We think the portion of the charge first and last above quoted is open to the criticism: First, that it was in conflict with the former portion of the charge in respect of the burden of proof; second, that it placed the burden of proof upon defendant as to his theory

of how the collision occurred, although his plea of not guilty was a negative and not an affirmative plea; third, that the charge, in substance, told the jury that, in order to find a verdict for defendant the evidence must so preponderate in its favor as to exclude a reasonable doubt of the truth of its theory as disclosed by the proof.

The violation of defendant's constitutional right to a fair and impartial trial, resulting from the foregoing error in the charge of the court, is emphasized by a comparison of that portion of the charge criticised, wherein the court charged the jury with respect to the *quantum* of proof required in order to find a verdict for defendant with another portion of the charge in which the jury was charged with respect to the *quantum* of the proof necessary to find a verdict in favor of the plaintiff, and where the court said as follows:

"The plaintiff is not bound to prove his case, nor any part of it, beyond a reasonable doubt; on the contrary, if when you have considered all of the evidence you shall find its greater weight is even slightly on the side of plaintiff's case, as alleged in his declaration, then he is entitled to your verdict; otherwise he is not."

So we see in this portion of the charge the court tells the jury that even a slight preponderance of all the evidence on plaintiff's side would suffice to entitle him to the verdict, and that in the absence of such prepon-

derance, plaintiff was not so entitled. But the charge fails to tell the jury at this point, or anywhere else, that if all the evidence as to its weight and credibility is in equipoise, or preponderates in favor of defendant, that the verdict of the jury should be for defendant. The possible event of a verdict for defendant is nowhere considered in the charge, except in that portion which is made the basis for the third assignment of error, and that portion of it where the court was instructing the jury in respect of the form of the verdict in the event they should find for defendant.

No complaint is made in any assignment of error in this case in respect of that portion of the charge of the court in which he told the jury, in substance, that a slight preponderance "on the side of plaintiff's case" would be sufficient to entitle plaintiff to the verdict. A charge, in substance the same, was approved by the majority of this court in *Chapman* v. *McAdams*, 1 Lea (69 Tenn.), 500. Judge McFarland, however, in a very vigorous dissenting opinion pointed out the dangers of the argument in favor of the correctness of such a charge.

Among the reasons given by him, we note especially the following, which are, in substance, that, if a slight preponderance of the evidence in favor of the party in a civil suit upon whom the onus or burden of the evidence rests be held sufficient to turn the scale and entitle him to the verdict then why not further modify the preponderance requisite by saying a "very slight preponderance—a feather's weight"—would suffice?

The evidence, as he says, might not be in absolute equipoise, but yet so nearly in that state that the jury could not, with any degree of satisfaction, affirm that the fact was the one way or the other. And he said the charge, "slight or very slight," in modification of the required preponderance, was beyond any rule that he had found laid down, and calculated to mislead the jury.

The sound and safe rule, and the one sanctioned by the weight of authority is, as we think, in favor of his view. *McBee* v. *Bowman,* supra; *Gage* v. *Railroad Co.,* 88 Tenn. (4 Pickle), 726, 14 S. W., 73; *Wilcox* v. *Hines,* 100 Tenn. (16 Pickle), 524, 45 S. W., 781, 66 Am. St. Rep., 761; *Knights of Pythias* v. *Steele,* 107 Tenn. (23 Pickle), 1, 63 S. W., 1126.

In the opening of the charge of the court to the jury in this case, as the same appears in the transcript, the court said: "Gentlemen of the jury, Shannon's Code, section 2406 reads as follows, to wit: [Read it]" This we suppose means that, as a part of the charge to the jury, the court read to them section 2406, of Shannon's Code as follows: "The Street Railway Company shall be held responsible, under the laws of the State, for any accident which may result from any negligence on their part, or of their agents acting under their authority."

This section of the Code, appearing as it did in the opening paragraph of the charge of the court, and without an accompanying explanation that the defendant would not be liable in the present case if the jury

should find from a preponderance of all the evidence that the proximate cause of the injuries complained of was the concurrent negligence of the defendant and of the plaintiff, was calculated to mislead the jury into the conclusion that, if the defendant was guilty of any negligence, liability would follow without regard to concurrent negligence on the part of the plaintiff as the proximate cause of the injury.

It is unnecessary to discuss the first and second assignments of error in this case, since in our opinion it is clear that the positive error in the charge of the court complained of under the third assignment of error is sufficiently grave, even under the provisions of chapter 32, of the Acts of 1911, to entitle the defendant to have this case reversed, and a new trial awarded.

Therefore the judgments of the court of civil appeals and of the circuit court of Davidson county, are, respectively, reversed, and this case is remanded to the circuit court of Davidson county for a new trial.

GRIGSBY & CO. *v.* BRATTON.

(*Nashville.* December Term, 1913.)

1. **EXPLOSIVES. Gasoline. Injuries to automobile. Contributory negligence. Burden of proof.**

In an action for injuries from the explosion of plaintiff's automobile by gasoline being poured into the tank coming in contact with a light on the machine, it will be assumed, in the absence of contrary evidence, under the rule as to the burden of proof, that the cap of the tank was removed by plaintiff before he went in to direct the tank to be filled, rather than by defendant's employees who filled it. (*Post*, *p.* 601.)

2. **EXPLOSIVES. Contributory negligence.**

Plaintiff's son drove plaintiff's automobile to defendant's drug store to have it filled with gasoline, and, after stopping the machine in front of the store and ordering the gasoline, turned down the light of a lamp attached to the rear of the automobile about twenty inches under the cap of the tank into which the gasoline was poured, and walked away to talk to some boys. The side of the lamp next to defendant's store was of metal, so that the light did not show in that direction, and defendant's clerk brought out a five-gallon gasoline can, and, without noticing that the light was burning, placed a funnel in the mouth of the tank and lifted the can to pour gasoline into the tank, when some of the gasoline ran down and came in contact with the light causing an explosion. There was no proof whether the cap on the automobile tank was originally removed by plaintiff's son or by defendant's clerk. *Held*, that plaintiff's son was negligent in merely lowering the light and removing the tank cap and walking away, without explaining to defendant's clerk that the tank was not ready to be filled. (*Post*, *pp.* 599, 600.)

3. **EXPLOSIVES. Negligence. Proximate cause.**

The negligence of plaintiff's son was the proximate cause of the explosion. (*Post*, *pp.* 601, 602.)

4. **NEGLIGENCE. Contributory negligence. Proximate cause.**

If plaintiff's negligence continued up to the time of the accident and contributed thereto, either the negligence of the parties was concurrent, or else plaintiff could have avoided the accident, making his negligence in either event a proximate cause of the accident. (*Post*, *p.* 603.)

Cases cited and approved: Barr v. Railroad, 105 Tenn., 545; Seith v. Commonwealth Co., 241 Ill., 252; Railroad v. Roe, 118 Tenn., 601.

5. **NEGLIGENCE. "Proximate cause."**

"Proximate cause" does not necessarily mean that which is last in time or place, but means that which is the procuring and efficient cause of the accident, and indicates, rather, nearness in causal relation. (*Post*, *p.* 603.)

Cases cited and approved: Gilson v. Canal Co., 36 Am. St. Rep., 811, notes; Barr v. Railroad, 105 Tenn., 545; Rosenbaum v. Shoffner, 98 Tenn., 630.

6. **NEGLIGENCE. Contributory negligence. Effect.**

Where plaintiff and defendant are both guilty of negligent acts which together constitute the proximate cause of the injury, plaintiff cannot recover. (*Post*, *p.* 604.)

Cases cited and approved: Railway v. Haines, 112 Tenn., 715; Traction Co. v. Brown, 115 Tenn., 325.

FROM WILSON.

Appeal from Circuit Court of Wilson County to the Court of Civil Appeals and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—JNO. E. RICHARDSON, Judge.

W. R. CHAMBERS and FRANK MCMILLAN, for plaintiff in error.

LILLARD THOMPSON and W. S. FAULKNER, for defendant in error.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This cause was tried by the circuit judge, without the intervention of a jury, and his findings of fact were reduced to writing pursuant to the request of defendant below, Thomas Grigsby, who, as sole owner, conducted a drug store in Lebanon under the name style of Grigsby & Co.

From this finding it appears that plaintiff's (Bratton's) automobile was by his direction taken by his son, Clyde Bratton, aged about seventeen years, to the defendant's drug store to be replenished with gasoline. The machine was driven to a point in the street in front of the store at or about dark. Young Bratton had theretofore taken this and other machines to this store for the same purpose.

When the machine was so stopped and an order for gasoline given and accepted, Clyde Bratton turned down to some extent the light of a lamp (attached at the rear end of the automobile) because, as he explains, the light was high. He later turned away from the machine and walked to the pavement to talk with some boys.

The tank that carried gasoline for consumption by the machine was cylindrical in form, and was placed in the rear of the body and over the lamp referred to. At the center of the top of the tank was a hole for

the inpour of gasoline, covered by a filler cap. The distance from this cap to the top of the lamp was 24 inches. The lamp had two glass sides, but its side next to the store was of metal, so that its light did not show in that direction.

Bass, a drug clerk of defendant, approached the machine carrying a five-gallon can filled with gasoline. He did not see or notice that the light was yet burning at the lamp. The can used was of tin, incased in a wooden jacket, with a round mouth in the center of the top, which top was cone shaped. Handles were on the side of the wooden jacket, and by one of these the can was carried to the machine. The can was one used by wholesale dealers in shipping oil, and not a receptacle in which gasoline was shipped to defendant. The clerk placed a funnel in the mouth of the tank, lifted the can gently, placing its projecting mouth just over the rim of the funnel. After a gallon of gasoline had been poured, ignition and injury to the machine occurred.

The custom at this place of business was for the driver of the machine to remove the filler cap. The proof does not show who in fact removed it on this occasion.

The circuit judge found that the fire and resulting injury to the automobile sued for resulted from the handling and pouring of the gasoline, either from spilling gasoline, with the result that it came in contact with the fire of the lamp, or from fumes diffusing, and that the weight of the evidence was in favor of the former as the cause; that the gasoline was spilled un-

consciously; that the injury was due to the handling of the can and the natural tendency of the liquid to run from the round-rimmed mouth of a can when full on its being tilted at elbow height, which was approximately the height of the funnel.

From the facts found, the circuit judge drew the conclusion of law that there was actionable negligence on the part of defendant through Bass, and rendered judgment accordingly. Defendant appealed.

The court of civil appeals held that there was a reasonable inference of negligence on the part of defendant from the pouring of the gasoline from the can that was used, and ruled in affirmance. Petition for *certiorari* has been filed by defendant to bring this judgment under review by this court.

If we assume, without deciding, what might be a subject of serious dispute, negligence on the part of defendant on the ground that the can was overfilled, or was not a fit one, in that its projecting mouth did not extend far enough beyond the edge of the funnel for safe pouring, he being unaware of the light's burning, we have yet to consider a question not commented on by either the lower court or the court of civil appeals: Was plaintiff's son and agent himself guilty of negligence which proximately contributed to the injury?

We are of opinion that fair inferences deducible from the facts found are: That, in the absence of proof as to who did it, the filler cap must be taken to have been removed by Clyde Bratton rather than by Bass. This, either under the custom proven, or under

the rule as to the burden of proof. That, when this cap was removed, and the lamp light was lowered by plaintiff's son, thus diminishing its power as a potential warning to the drug clerk, to whom the light then was not obvious because of the lamp's metal side, the clerk had a right to assume that the automobile had been by its driver placed in condition to receive the charge of gasoline. It does not appear that the customary mode of filling the tank, as respects the can or manner of pouring, was departed from, or that accidents had occurred prior to this.

The light should have been extinguished, but, from the facts found, plaintiff has not shown this to have been incumbent on defendant. The inference from young Bratton's acts in lowering it, and then presumedly removing the filler cap is in favor of defendant.

We are unable to see that the negligence of defendant, so assumed, intervened between the negligence attributable to the plaintiff and the accident as the sole proximate cause of the injury. Negligence is so attributable to the plaintiff in his son's merely lowering the light, removing the top, and walking away from the machine to talk to other boys without any explanation being made by him to Bass that the machine had not been put in readiness for the filling of its tank.

The contention before us to excuse plaintiff from contributory negligence is to the effect that plaintiff's negligence preceded and had expended itself before defendant's negligence intervened, and was not con-

tinuous to the instant of the accident, and therefore is not to be conceived of as proximately contributory.

The light was left burning to that instant, and the driver of the machine was yet without cause away from the machine. But for one or both of these facts, the accident would not have happened.

If, notwithstanding defendant's fault, plaintiff's negligence so continued and contributed to the accident, then either the negligence of the parties was concurrent, or else the plaintiff himself is to be held as having had the opportunity of avoiding the injury, and his contribution is, in either event, not remote in the chain of causation. *Barr* v. *Railroad,* 105 Tenn., 545, 58 S. W., 849; *Seith* v. *Commonwealth Co.,* 241 Ill., 252, 259, 89 N. E., 425, 24 L. R. A. (N. S.), 978, 132 Am. St. Rep., 204, 208; *Railroad* v. *Roe,* 118 Tenn., 601, 609, 102 S. W., 343.

What is meant by "proximate cause" is not necessarily that which is next or last in time or place, but that which is a procuring, efficient, and predominant cause. Closeness in causal relation, rather, is the meaning. Notes to *Gilson* v. *Delaware, etc., Canal Co.,* 36 Am. St. Rep., 811; *Barr* v. *Railroad,* supra; *Rosenbaum* v. *Shoffner,* 98 Tenn., 630, 40 S. W., 1086, and cases cited; 13 Am. & Eng. L. (2 Ed.), 490; 7 Am. & Eng. L. (2 Ed.), 376; 29 Cyc., 491-499.

Assuming that defendant was negligent, we are of opinion that plaintiff's negligence continued to operate concurrently at the moment of the accident in producing it; that there was no independent, self-support-

ing act of defendant that solely caused the injury, or so came into operation as to make plaintiff's negligence remote. The negligence acts of plaintiff, outlined above, tended to make and keep the clerk unaware of the dangerous situation and probable consequences that confronted him. In the findings of fact there is embodied nothing that indicates knowledge of plaintiff's precedent negligence on the part of Bass from which indifference to defendant's rights could be inferred. *Railroad* v. *Roe,* supra.

Where the plaintiff and defendant are thus guilty of acts of negligence which together constitute the proximate cause of the injury, then the negligence of plaintiff, however slight, bars a recovery. *Railway* v. *Haynes,* 112 Tenn., 715, 81 S. W., 374; *Traction Co.* v. *Brown,* 115 Tenn., 325, 89 S. W., 319.

The writ of *certiorari* is granted, and the judgment reversed. Judgment here for defendant, Grigsby, with costs in his behalf.

McClaugherty *et al. v.* Cline *et al.*

(*Nashville.* December Term, 1913.)

1. **INNKEEPERS. What constitutes. "Boarding house keeper." "Hotel keeper."**

The words "innkeeper" and "hotel keeper" are synonymous, but each is distinct from a "boarding house keeper," in that the innkeeper has no right to select his guests, but must receive everyone applying for accommodation who conducts himself in a proper manner, etc., while the keeper of a boarding house is one who maintains a house for the accommodation of those who enter under contract for entertainment at a certain rate for a certain period at an agreed compensation; nor does a boarding house cease to be such because transients are occasionally entertained; nor does a hotel lose its character merely because, incidentally, it entertains boarders under contract for compensation for a specified time. (*Post*, *pp.* 606, 607.)

Case cited and distinguished: Rex v. Ivens, 7 Car. & P., 213.

Cases cited and approved: Stewart v. McCready, 24 How. Prac. (N. Y.), 62; Willfard v. Reinhardt, 2 E. D. Smith (N. Y.), 148; Civil Rights Cases, 109 U. S., 3; Meacham v. Galloway, 102 Tenn., 415; Dickerson v. Rogers, 23 Tenn., 179; Hill v. Hotel Co., 124 Tenn., 376; Kisten v. Hildebrand, 9 B. Mon. (Ky.), 72; Coe v. Ricker, 214 Mass., 212.

2. **INNKEEPERS. Privilege tax. "Boarding house."**

Complainants maintained a public house, kept open at certain assembly grounds, for boarders who attended an assembly, which lasted for eight weeks during the summer. Complainants were paid at a specified sum per week, and, if any boarder left without remaining a full week, he was charged $1.50 per day. Complainants kept no porter, office, or register, and did not solicit business further than by advertisement. *Held*, that complainants kept a "boarding house," and not a hotel, and were, therefore, not required to pay a privileged tax imposed on hotel keepers by Acts 1909, ch. 479. (*Post*, *p.* 608.)

FROM GRUNDY.

Appeal from Circuit Court, Grundy County.—EWING L. DAVIS, Judge.

JEFF D. FULTS and FULTS & SCHWOON, for appellants.

THOS. KING, for appellees.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This is a suit brought by Mrs. McClaugherty, joined by her husband, to recover from defendant Cline a sum paid by her under protest, demanded by defendant, as county court clerk, of her as a privilege tax, the privilege being that of running a hotel at Monteagle Assembly Grounds. From an adverse judgment she appealed, and has assigned errors.

The insistence in behalf of appellant is that since the Revenue Act (Acts 1909, ch. 479) does not impose any privilege tax on boarding houses, but only on hotels and inns, the house conducted by her cannot be treated as a hotel, but is a boarding house.

We have, therefore, to determine whether appellant's house is to be classed as a hotel or a boarding house, as those places are defined and differentiated at common law. "Innkeeper" and "hotel keeper" are

synonymous, but each is distinct from a keeper of a boarding house.

"The innkeeper," said Coleridge, J., in *Rex* v. *Ivens*, 7 Car. & P., 213, "is not to select his guests. He has no right to say to one, 'You shall come into my inn,' and to another, 'You shall not,' as everyone coming and conducting himself in a proper manner has a right to be received; innkeepers being a kind of public servants, having the privilege of entertaining travelers, and of supplying them with what they want."

The term "hotel" is properly applied to places kept for the entertainment of travelers and casual or transient guests, while a boarding house is one for the accommodation of those who enter under contract for entertainment at a certain rate for a certain period of time, as for a week or month, at a rate of compensation agreed on. *Stewart* v. *McCready*, 24 How. Prac. (N. Y.), 62; *Willard* v. *Reinhardt*, 2 E. D. Smith (N. Y.), 148; *Civil Rights Cases*, 109 U. S., 3, 3 Sup. Ct., 18, 27 L. Ed., 835; *Meacham* v. *Galloway*, 102 Tenn., 415, 52 S. W., 859, 46 L. R. A., 319, 73 Am. St. Rep., 886; *Dickerson* v. *Rogers*, 4 Humph., 179, 40 Am. Dec., 642; *Hill* v. *Memphis Hotel Co.*, 124 Tenn., 376, 136 S. W., 997; 22 Cyc., 1072.

A boarding house does not cease to be such because transients are occasionally entertained. *Kisten* v. *Hildebrand*, 9 B. Mon. (Ky.), 72, 48 Am. Dec., 416. Nor does a hotel lose its character as such merely because in it, incidentally, are entertained boarders under contract for compensation by the week or month.

Meacham v. *Galloway*, supra; *Coe* v. *Ricker*, 214 Mass., 212, 101 N. E., 76, 45 L. R. A. (N. S.), 30.

Appellant's house, "Balcony Place," was kept open for the entertainment of boarders who attended the assembly, which lasted for the eight weeks of the summer. Compensation was stipulated to be by the week, and if any boarder left without remaining a full week, the sum charged was $1.50 per day. Appellant kept no porter, no office, no register, and did not solicit business further than by advertisement in the Assembly Annual. She was not the keeper of a hotel within the meaning of the revenue act.

What is said above is meant to have relation to the character of the place, and is not intended to touch upon the character of the duties and liabilities of the proprietor, under any statutory modification of the common law rules relating thereto.

Other assignments of error are disposed of orally. Reversed, and judgment here for sum demanded and paid under protest for the year 1912.

KENDRICK-ROAN GRAIN & ELEVATOR CO. *et al.* *v.* WEAVER *et al.*

(*Nashville.* December Term, 1913.)

1. **PRINCIPAL AND SURETY. Fidelity bond. Warehouse superintendent. Fund.**

A corporation operating a grain warehouse, desiring to borrow money from a bank on warehouse receipts, appointed W., who, in fact, was a mere bookkeeper for the corporation, superintendent of the warehouse, and procured a fidelity bond from defendant surety company guaranteeing against loss arising from W.'s fraud in issuing warehouse receipts without having the grain in store. The bond contained a rider that it should not cover any loss except such as might grow out of the issuing of fraudulent receipts signed by W. in conjunction with an officer of the warehouse company, and only such receipts as should be pledged to complainant bank as collateral in the regular course of its business. *Held*, that, where W. executed receipts in conjuction with the president of the warehouse company for grain in excess of that stored, which receipts were thereupon pledged to the bank, W. thereby certified to a fact as of his own knowledge, and was guilty of fraud within the rider of the bond, though he had no actual knowledge of the falsity of the receipts, and though he, in fact, was not the superintendent of the warehouse, and performed no duties pertaining to such office. (*Post*, *pp.* 612-625.)

Cases cited and approved: Dawe v. Morris, 4 L. R. A., 158, 159; Bullitt v. Farrar, 42 Minn., 8; Hedlin v. Minneapolis Medical & Surgical Institute, 35 L. R. A., 430, 431; Andrews v. Jackson, 168 Mass., 266; Fargo Gas Light & Coke Co. v. Fargo Gas & Electric Co., 4 N. D., 219; Hindman v. First National Bank, 112 Fed. 931; Shacklett v. Bickford, 74 N. H., 57; Aldrich v. Scribner, 154 Mich., 23; Morrow v. Bonebrake, 84 Kan., 724; Martin v. Hutton, 90 Neb., 34; Westerman v. Corder, 86 Kan., 239.

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2. **PRINCIPAL AND SURETY. Fidelity bond. Conditions. Performance by employer. Omission. Rights of third persons.**

Where a surety company executed a fidelity bond for the benefit of a bank, insuring against loss sustained by the issuance of fraudulent warehouse receipts by the alleged superintendent of a warehouse, which might be pledged by the warehouse company to the bank, the fact that the warehouse company misrepresented the employee's position as warehouse superintendent, when, in fact, he was a mere bookkeeper, and that the warehouse company failed to inform the surety of the employee's default, etc., did not relieve the surety from liability for such defaults to the bank; the bank being under no obligation to the surety company to see that such conditions of the bond were complied with. (*Post*, *pp.* 627, 628, 629, 630, 631, 632.)

Cases cited and approved: American Surety Co. v. Pauly, 170 U. S., 133; Fidelity & Deposit Co. v. Courtney, 186 U. S., 342; Wells Fargo & Co. v. Walker, 9 N. M., 456; Carrollton Furniture Co. v. American Credit Indemnity Co., 124 Fed. 27; Hormel v. American Bonding Co., 112 Minn., 288; People, ex rel., Casson v. Rose, 174 Ill., 310.

3. **PRINCIPAL AND SURETY. Fidelity bond. Extent of liability.**

Where a bond secured plaintiff bank against the issuance of fraudulent warehouse receipts by the superintendent of a warehouse in so far as such receipts might be pledged by the warehouse company to the bank, and receipts issued by the superintendent for an amount of grain in excess of that deposited were pledged to the bank, the surety's liability on the bond was the difference between the value of the grain called for by the receipts and the value of the amount actually stored under each of them at the time they were issued. (*Post*, *pp.* 632, 633.)

Cases cited and approved: Hindman v. First National Bank, 112 Fed. 931; McDonald v. Unaka Timber Co., 88 Tenn., 38; Paragon Refining Co. v. Lee Bros., 98 Tenn., 643; Cole v. Zucarello, 104 Tenn., 64.

Grain Co. v. Weaver.

4. PRINCIPAL AND SURETY. Fidelity bond. Warehouse receipts. Pledge.

Where a warehouseman's superintendent was bonded to secure a bank against fraudulent warehouse receipts that might be pledged to it to secure loans to the warehouse company, and fraudulent receipts were issued for more grain than was deposited under them, which receipts were pledged to the bank, it was not material, either to the surety's liability, or to the bank's right to recover under the bond, that the warehouse company, after pledging the receipts, disposed of all of the grain covered thereby. (*Post*, *pp.* 633, 634.)

5. PRINCIPAL AND SURETY. Fidelity bond. Loss. Failure to pay. Penalty.

Where, in an action on a fidelity bond, it appeared that the surety interposed its defense in good faith, and the construction of the policy as a whole presented a matter of some difficulty, the surety company, though ultimately found liable, was not subject to the penalty imposed by Acts 1901, ch. 141, on insurers for refusal to pay a loss within 60 days after demand, etc., unless such refusal shall have been in good faith. (*Post*, *pp.* 634, 635.)

Acts cited and approved: Acts 1901, ch. 141.

Case cited and approved: Continental Fire Ins. Co. v. Whitaker & Dillard, 112 Tenn., 168.

FROM DAVIDSON.

Appeal from Chancery Court, Davidson County.—JNO. ALLISON, Chancellor.

STOKES & STOKES, P. D. MADDIN, and C. T. BOYD, for appellant.

T. M. STEGER and CHERRY & STEGER, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The responsible defendant in this case is the National Surety Company; Weaver being financially unable to respond to the liability charged. The real complainant is the Fourth National Bank.

The bill was filed for the purpose of holding J. H. Weaver and the National Surety Company for a loss of $40,000, alleged to have been sustained by the Fourth National Bank of Nashville, Tenn., by reason of certain alleged fraudulent conduct of Weaver.

Weaver was bonded as superintendent of the Kendrick-Roan Grain & Elevator Company's warehouse. The bond is in the usual form; the contracting parties on the face of it being Joseph H. Weaver, as principal, and the National Surety Company as surety, and Kendrick-Roan Grain & Elevator Company as obligee.

It designated Kendrick-Roan Grain & Elevator Company as the employer, and Joseph H. Weaver as the employee; recited that the employer had appointed the employee to the office or position of superintendent of its warehouse at Nashville, Tenn., that the employer required security as indemnity against loss on account of the personal dishonesty amounting to larceny or embezzlement of the employee in the performance of his duties in the position referred to; engaged that the surety company, "subject to the conditions and provisons herein contained, which shall be conditions precedent to the right of the employer to recover un-

der this bond," would, on the furnishing of satisfactory proof of loss, make good to the employer any loss sustained by it "by or through the personal dishonesty amounting to larceny or embezzlement of the employee, and for which the employee shall be legally liable to the employer," occurring between January 22, 1909, and January 22, 1910.

The bond provided under paragraph second that it should be the duty of the employer to communicate to the surety company "any act, fact, or information tending to indicate that the employee is or may be unreliable, deceitful, dishonest, or unworthy of confidence, or intemperate, or gambling, or indulging in other vices;" that, in case the employer should fail in this regard, the surety company would not be liable for any act of the employee thereafter committed.

The fifth paragraph contained the provision that, if the employee should cease to act in the position to which he had been appointed in the service of the employer, the surety company should not thereafter be liable; the eighth, that all written statements and declarations concerning the employee or his duties or accounts made to the surety company by the employer were to be treated as being the basis of the bond, also that the bond was entered into on condition that the business of the employer should continue to be conducted, and the duties of the employee should remain, in accordance with the written statements made by the employer to the company relative thereto, and that, if during the continuance of the bond any circumstances

should occur or change should be made which would have the effect of making the actual facts differ from such statements without immediate written notice thereof to the surety company, and the procurement of its consent, the latter should not thereafter be liable; tenth, that the employee should be liable to the surety company for any loss which it had been required to pay to the employer; fifteenth, that the receipt and retention of the bond, or the making claim for any loss thereunder by the employer, should be taken and held as a covenant on its part, "consenting and agreeing to all the terms, provisions, and conditions herein contained," and that the employer would make frequent audits and examinations. The eighteenth was also upon the subject of audits, but referred only to a case where the employee was acting for more than one principal.

The amount of the bond was fixed at $40,000.

There was a rider attached in the following language:

"There shall be no liability on this bond in respect of any loss except such as may grow out of the issuing of fraudulent warehouse receipts, and it is specifically conditioned by the surety that the only warehouse receipts referred to are such as may be signed by the employee as warehouseman in conjunction with an officer of the employer; that there shall not be outstanding at any one time more than forty thousand dollars ($40,000), face value, of such receipts, and only those of such receipts are referred to and covered

hereby as shall be pledged with the Fourth National Bank of Nashville, Tenn., as collateral in the regular course of business of said bank."

The bond was signed by Joseph H. Weaver and the National Surety Company. The rider was signed by the National Surety Company only.

The other provisions of the bond have no bearing on the present litigation.

In order to a proper understanding of the controversy, it is necessary to state that Kendrick-Roan Grain & Elevator Company (hereinafter called the Kendrick Company) had obtained a line of credit covering $20,000 with the Fourth National Bank, on a bond executed on the 1st of February, 1909. This bond had a rider expressed in the same language, except only as to the amount involved. The origin of that bond was this: The Kendrick Company was engaged in buying and selling grain, and had borrowed, from time to time, large sums of money from the bank on in-coming grain, covered by bills of lading, on the difference between the value at which the grain had been purchased and its value in the Nashville market; the bank holding the bills of lading as security for such value, in addition to the sums paid to the consignors. The Kendrick Company, desiring to use as a basis of credit the grains which they had purchased, and desiring to change their former method of business from dealing through the ordinary public bonded warehouses, conceived the thought of building a warehouse of their own, and installing therein a bonded superintendent

for the purpose of enabling them to use, through the medium of warehouse receipts as a basis of credit, the grain which they might hold in store. The bank agreed to handle these warehouse receipts on condition that it should be secured by a rider in the form appearing at the foot of the foregoing bond. In its letter to the agent of the surety company the bank explained its purpose, and what was meant by the word "fraudulent," in the following language: "In explanation of the situation, I would state that it is not the desire or purpose of the grain dealers referred to to do a general warehouse business, and issue negotiable receipts to such parties as may wish to store grain with them, and the object desired to be accomplished is that they may be in a position to handle their own receipts with this bank, to be pledged against money borrowed." The letter then sketches the substance of the rider with expressions of opinion as to the smallness of the risk which the surety company would thereby assume, and continues:

"As protection of this bank, we would wish your bond to state that you guarantee the warehouse against fraud and dishonesty; the purpose of this clause being that this bank shall know absolutely that it is protected against the issuance of any receipts behind which there might possibly not be the grain called for.

"All receipts to be issued under the conditions above stated must have the signatures of both the warehouseman and an officer of the company, and under the ar-

rangement proposed it seems to me your liability is very limited, especially in view of the fact that the company issuing the receipts would be responsible to you in the event of fraud, and, as the limit of any one company is $20,000, face value and receipts, I apprehend your risk would be practically a minimum."

The $20,000 bond with its rider was executed; the language of that bond being, as already stated, the same as the present bond, save the difference in the amounts.

Subsequently the Kendrick Company desired to increase its line of credit available by warehouse receipts to the extent of $40,000, and the bond sued on was accordingly executed, and, as perceived from our summary of the bond, it was made to cover the period from 22d of January, 1909, to 22d of January, 1910, antedating the prior bond.

While the $20,000 bond was in force, and before the execution of the bond sued on, $30,000 was borrowed on the warehouse receipts, the remaining $10,000 of the whole $40,000 having been borrowed after the execution of the present bond; but this bond reached back, as shown in the last paragraph, so as to embrace the period of both bonds, and to cover the whole sum. It is insisted that the defendant surety company was deceived as to the existence of this $10,000 in excess of the $20,000 bond; but there is nothing in the record to show such fact. The sums borrowed were as follows:

"February 1, 1909, $4,000, with warehouse receipt as collateral calling for 10,000 bushels No. 3 white

oats; February 2, 1909, $4,000, with warehouse receipt as collateral calling for 10,000 bushels No. 2 white oats; February 2, 1909, $6,000, with warehouse receipt as collateral calling for 10,000 bushels No. 2 mixed corn; February 2, 1909, $5,000, with warehouse receipt as collateral calling for 8,500 bushels No. 2 mixed corn; February 2, 1909, $5,000, with warehouse receipt as collateral calling for 8,500 bushels No. 2 mixed corn; February 3, 1909, $6,000, with warehouse receipt as collateral calling for 10,000 bushels No. 2 mixed corn; March 13, 1909, $2,250, with warehouse receipt as collateral calling for $5,000 bushels No. 2 mixed oats; March 13, 1909; $2,250, with warehouse receipt as collateral calling for 5,000 bushels No. 2 mixed oats; March 13, 1909, $2,250, with warehouse receipt as collateral calling for 5,000 bushels No. 2 mixed oats; March 13, 1909, $2,250, with warehouse receipt as collateral calling for 5,000 bushels No. 2 white oats; March 25, 1909, $1,000, with warehouse receipt as collateral calling for 2,250 bushels No. 2 white oats."

All of the notes were demand notes. The business ran along until some time in July, 1909, when the Kendrick Company failed. The bank then demanded the grain on the collateral; but there was no grain to meet the liability, it all having been shipped out by the Kendrick Company. The present suit was then brought on the bond.

All of the notes were signed by the Kendrick Company, and each of them distinctly pledged the amount of grain described in the warehouse receipt attached

thereto. A copy of one of these warehouse receipts will suffice as an illustration of all, viz.:

"Nashville, Tenn., Feb. 2, 1909.

"No. 3. Quantity 560,000 pounds.

"Received and stored in Kendrick-Roan Grain & Elevator Company's warehouse 10,000 bushels of No. 2 mixed corn, weighing 560,000 pounds.

"This commodity will be delivered only upon the return of this receipt properly indorsed. No warehouse charges are to accrue against this receipt.

"[Signed] J. H. WEAVER,

"Superintendent of Warehouse."

Countersigned:

"M. K. KENDRICK,

"President and General Manager."

Indorsed:

"M. K. KENDRICK,

"President and General Manager."

All the receipts were signed by Weaver, as warehouseman, in conjunction with M. K. Kendrick, president, in the manner above shown, and the amount issued was $40,000 face value, and none were issued except such as were pledged to the Fourth National Bank of Nashville, Tenn., in the regular course of its business. So it is perceived that the terms of the rider were complied with, unless the receipts were fraudulently issued; that is, issued without grain to cover them.

On this subject, the bill alleges:

"That said warehouse receipts were false and fraudulent, and in furtherance thereof would show to the court that on February 22, 1909, two warehouse receipts were isused by defendant J. H. Weaver which were deposited with the complainant Fourth National Bank as collateral security for loans that they made as hereinbefore set out, each of said receipts calling for 8,500 bushels of white corn, making a total of 17,000 bushels; that on the date there was not in the possession of the said warehouseman, and subject to receipt therefor, 17,000 bushels of white corn; that, as a matter of fact, there were only in the warehouse at that time 7,371 29/56 bushels of white corn; that on the same date, viz., February 2, 1909, defendant Weaver, as warehouseman, issued two receipts calling for 10,000 bushels each, or 20,000 bushels in all, of No. 3 white oats, which warehouse receipts were deposited with the complainant Fourth National Bank as collateral security for loans that day made as hereinbefore set out; that on that date there were not 20,000 bushels of No. 3 white oats in said warehouse, and subject to warehouse receipt therefor; that, as a matter of fact, there was in said warehouse on said date only 1,870 10/32 bushels of white oats; that on the same date, viz., February 2, 1909, the warehouseman issued a receipt calling for 10,000 bushels of No. 2 mixed corn, which receipt was deposited with the complainant Fourth National Bank as collateral security for a loan that day made as hereinbefore set out; that at that time there was no mixed corn in the warehouse, and

subject to warehouse receipt therefor; that on February 3, 1909, defendant Weaver, as warehouseman, issued a receipt calling for 10,000 bushels of No. 2 mixed corn, which receipt was deposited with the complainant Fourth National Bank as collateral security for a loan that day made as hereinbefore set out; that at that time there was no mixed corn in the possession of said warehouseman, and subject to a receipt therefor; that on March 13, 1909, defendant Weaver, as warehouseman, issued a receipt for 5,000 bushels of No. 2 white oats, which receipt was deposited with the complainant Fourth National Bank as collateral security for a loan that day made as hereinbefore set out; that at that time there were no white oats in the possession of said warehouseman, and subject to a receipt therefor; that on the same date, viz., March 13, 1909, the warehouseman, defendant Weaver, issued three receipts for 5,000 bushels each, or 15,000 bushels in all, calling for No. 2 mixed oats, which receipts were deposited with the complainant Fourth National Bank as collateral security for loans that day made as hereinbefore set out; that at that time there was not 15,000 bushels of No. 2 mixed oats in the possession of said warehouseman, and subject to a receipt therefor; that, as a matter of fact, on that date there were only 5,690 15/32 bushels of mixed oats; that on March 25, 1909, defendant Weaver, as warehouseman, issued a receipt calling for 2,250 bushels of No. 2 white oats, which receipt was deposited with the complainant Fourth National Bank as collateral security for a loan

that day made as hereinbefore set out; that at that time there were no white oats in the possession of said warehouseman, and subject to a receipt therefor; that all of said warehouse receipts issued as aforesaid and for the purposes aforesaid were false and fraudulent, excepting, possibly, one receipt for 5,000 bushels of No. 2 mixed oats out of three for the same number of bushels that were issued on the 13th day of March, 1909, and hereinbefore fully described."

These allegations of the bill are sustained by the evidence. The amount of grain found on hand on the several dates mentioned in the excerpt from the bill were ascertained by a careful examination of the books of the Kendrick Company by an expert, and they are not denied on the record.

It follows that, nothing else appearing, the said J. H. Weaver fraudulently issued the warehouse receipts within the sense and meaning of the rider, as it was understood through the correspondence between the parties which we have cited supra.

As to whether this fraud would make the surety company liable for the full value of the grain represented in the several receipts, or only for the deficiency between the amount represented and that actually on hand, we shall hereinafter state our conclusion.

It is insisted on the part of the surety company, however, that Weaver was not guilty of any fraud at all. The contention upon this subject is as follows: That, while Weaver was mentioned as superintendent of the warehouse, and was so bonded, he never in fact

acted in that capacity, but was only a bookkeeper of the Kendrick Company; that the employee who stayed at the warehouse, and attended to the receiving and shipping of grain, and looked after the warehouse, was one Kendrick Goode, a nephew of the president of the company; that the president made daily visits to the warehouse, which was about 150 yards from the office where Weaver stayed, and sometimes made three or four visits a day; that Kendrick Goode made reports to the office daily as to the amount of grain in store of the different kinds; that from these reports Weaver and Kendrick, the president, filled the blanks in the warehouse receipts, and Weaver then signed the receipts as warehouseman; that he never, in fact, had any actual knowledge as to whether the reports made by Kendrick Goode were true reports, but always supposed and believed they were true.

The record substantiates this contention as to the actual things which were done by Weaver, and by Kendrick and Kendrick Goode. It should be added, however, that the record further shows that, when Weaver filled in the blanks showing the amount of grain on hand, and signed the warehouse receipts, he attached these receipts to the demand notes, and he knew that they were to be used by the Kendrick Company in obtaining money by the hypothecation thereof. It should further be stated that the bank had no knowledge other than that Weaver was honestly performing the duties belonging to the office of superintendent of the warehouse, and it had no knowledge of any defi-

ciency in the amounts of grain certified. It relied fully on these receipts as stating the truth, and advanced the money on the faith and credit thereof.

It is insisted by the defendant, as matter of law, that, inasmuch as Weaver believed that the grain was on hand as certified to in the receipts, and had no actual purpose of defrauding the bank, he was not guilty of any fraud. Numerous authorities are cited for the purpose of sustaining this proposition. We shall not undertake to discuss these authorities in detail, but only state our conception of the law, which is that one is guilty of a gross fraud who certifies to a fact without knowing whether it is true or false, in violation of his official duty to know the existence of such fact, and who knows that his certificate is to be acted on by another who will advance money in reliance thereon, in ignorance of the fact that the certifying party has not discharged the duty incumbent on him to actually know before certifying. He shows a degree of recklessness which is tantamount to positive criminality. He shows a heart wholly devoid of a sense of duty, and wholly disregardful of the rights of his fellowmen. He violates a trust reposed in him by those dealing on faith of his signature. He is not simply guilty of negligence, but of outrageous wrongdoing. In so acting, Weaver was *particeps criminis* with M. K. Kendrick, who got the money on these receipts, knowing that the grain was not in the warehouse, since, without Weaver's signature, the receipts could not have been utilized.

The authorities are very numerous supporting the conclusion we have announced, viz.: Note to *Dawe* v. *Morris*, 4 L. R. A., 158, 159, and cases cited; *Bullitt* v. *Farrar*, 42 Minn., 8, 43 N. W., 566, 18 Am. St. Rep., 485, 6 L. R. A., 149, and note, page 150; note to *Hedin* v. *Minneapolis Medical & Surgical Institute*, 35 L. R. A., 430, 431, under title "g," "Statements as of One's Own Knowledge," and "h," "Reckless Statements," page 431, and on page 439, under heading "e," "Matters Stated as Facts, of Which the Speaker is Presumed to Have Knowledge;" *Andrews* v. *Jackson*, 168 Mass., 266, 47 N. E., 412, 37 L. R. A., 402, 60 Am. St. Rep., 390; *Fargo Gas Light & Coke Co.* v. *Fargo Gas & Electric Co.*, 4 N. D., 219, 59 N. W., 1066, 37 L. R. A., 593, and note pages 608-611; *Hindman* v. *First National Bank*, 112 Fed., 931, 50 C. C. A., 623, 57 L. R. A., 108, and particularly page 119; *Shacklett* v. *Bickford*, 74 N. H., 57, 65 Atl., 252, 124 Am. St. Rep., 933, 7 L. R. A. (N. S.), 646 and note; *Aldrich* v. *Scribner*, 154 Mich., 23, 117 N. W., 581, 18 L. R. A. (N. S.), 379 and note; *Morrow* v. *Bonebrake*, 84 Kan., 724, 115 Pac., 585, 34 L. R. A. (N. S.), 1147 and note; *Martin* v. *Hutton*, 90 Neb., 34, 132 N. W., 727, 36 L. R. A. (N. S.), 602; *Westerman* v. *Corder*, 86 Kan., 239, 119 Pac., 868, 39 L. R. A. (N. S.), 500, Ann. Cas., 1913C, 60.

But it is insisted by the defendant company that, regardless of the fraud of Weaver, it is released from the bond, because certain conditions precedent were not complied with. These points are presented in the

fourth, fifth, and ninth assignments, which are as follows:

"Fourth. The court erred in failing to hold that the surety company was discharged from liability on the bond because the complainant failed to comply with the conditions precedent which they agreed to perform and fulfill.

"Fifth. The court erred in failing to hold that the surety company was discharged from liability on said bond because the surety company was fraudulently induced by misrepresentation to issue a bond of Weaver as superintendent of the warehouse when he was not superintendent of the warehouse, nor did he perform any of the duties of such office."

"Ninth. Because of the court's failure to hold that the surety company was discharged on account of the failure of complainants, and especially Kendrick, president of the grain company, to communicate to the surety company, firstly, that Weaver was not warehouseman; secondly, that he was signing warehouse receipts negligently, without knowledge of the truth of their contents; thirdly, of the change of the employment of Weaver; fourthly, that warehouse receipts were being issued without grain being in the bins to cover the same."

It is perceived that the bond considered apart from the rider appears to be a contract wholly between Weaver and the National Surety Company on the one hand, and the Kendrick-Roan Grain & Elevator Company on the other.

The matters specified under the fourth assignment are, first, a violation of the duties of the employer under the paragraph of the bond marked "second" to inform the surety company of any "act, fact, or information tending to indicate that the employee is or may be unreliable, deceitful, dishonest, or unworthy of confidence;" secondly, a violation of the paragraph marked "fifth," and that marked eighth, and the fifteenth.

The points covered by these assignments may be thus summarized, viz.: That the surety company, by misrepresentation, was induced to believe that Weaver was superintendent of the warehouse when he was not so in fact; that he signed warehouse receipts without knowing the truth of their contents, and in this manner showed that he was unworthy of confidence, and the surety company was not informed of this course of conduct; that his duties were changed from that of warehouseman to that of bookkeeper; that the business of the employer was not conducted, and the duties of the employee Weaver did not remain, as provided in the eighth paragraph "in accordance with the written statements made by the employer to the company relative thereto," and that thereby, in violation of that paragraph, circumstances had changed which had the effect of making the actual facts different from such statements, and that no written notice was given to the company of such change; that no audit was made of Weaver's business which it is alleged was in violation of the fifteenth and eighteenth paragraphs.

This is no evidence of any representation made by the Kendrick Company to the surety company. However, it is clear from the face of the bond itself that the contract between the Kendrick Company and the surety company was that Weaver was to act as superintendent of the warehouse, and we are of the opinion this would be the equivalent of a representation within the sense and meaning of the bond.

So far as concerns the joint conduct of Weaver and M. K. Kendrick, the president, we are of the opinion that they were acting in collusion, and that the knowledge of Kendrick alone would not be binding upon the Kendrick Company, on the principle that knowledge acquired by an unfaithful agent of a corporation in collusion with another unfaithful agent, of their own wrongdoing, is not the knowledge of the corporation, or binding on it. Walker on Fidelity Bonds, sec. 163, pp. 230, 231; *American Surety Co.* v. *Pauly*, 170 U. S., 133, 18 Sup. Ct., 552, 42 L. Ed., 977; *Fidelity & Deposit Co.* v. *Courtney*, 186 U. S., 342, 22 Sup. Ct., 833, 46 L. Ed., 1193; *Wells Fargo & Co.* v. *Walker*, 9 N. M., 456, 54 Pac., 875. However, the fact that Weaver was not active at the warehouse was known to Mr. Roan who was secretary and treasurer of the company, and we think his knowledge would be that of the company. So, if the Kendrick Company were the real complainant here, we believe there could be no doubt that it would be the duty of the court to hold that the surety company was released, on the ground that Weaver was not, to the knowledge of the employer, performing the

duties which he was bonded to perform, but was acting principally as bookkeeper, and only certifying in his own name the acts really performed by another person who was discharging the duties which he had contracted to perform.

But do these considerations apply to the Fourth National Bank? We are of the opinion they do not. It is apparent from the rider, as well as from the facts which we have stated as having transpired while the bond was in course of negotiation, that this instrument was primarily, if not wholly, for the security of the bank. In so far as the provisions in the body of the bond are in conflict with the terms of the rider, the former as between the bank and the surety company must give way. *Carrollton Furniture Co.* v. *American Credit Indemnity Co.*, 124 Fed., 27, 59 C. C. A., 545; 2 Paige on Contracts, sec. 1119. Moreover, bonds of this character are insurance contracts and are to be construed most strongly against the insurer, so as to sustain the liability, if it can be done, in reasonable harmony with the conditions of the instrument. Walker on Fidelity Bonds, pages 8-19 and authorities cited. See, also, Id. 19-32; *Hormel* v. *American Bonding Company*, 112 Minn., 288, 128 N. W., 12, 33 L. R. A. (N. S.), 513 and note; *People, ex rel. Casson*, v. *Rose*, 174 Ill.; 310, 51 N. E., 246 44 L. R. A., 124.

No other conclusion can be derived from the rider than that the chief, if not the sole, purpose of the contract was to protect the Fourth National Bank to the extent of $40,000. The other parts of the bond, in ascer-

taining the rights of the bank, are to be referred to only so far as to make complete that part of the contract. So much of it as refers to the duties of the employer, in the particulars hereinbefore mentioned, were wholly inapplicable to the bank, and could not have been performed by it, and were not expected to be performed by it. The fact must be recognized that the surety company imposed, on the form of a bond applicable only to an employer and employee, wherein the employer is protected against the improper conduct of the employee, a totally different obligation; that is, security to a bank against improper conduct of some employee of the company. So much of the bond, or form of bond, as is inapplicable to the latter phase must be held inapplicable to the bank. This must be the true construction, or else it must be held that the bank became responsible for the conduct of the employer, and that the failure of the latter to perform the various duties referred to would defeat the security held by the bank; whereas, it is perfectly evident from the rider that the security which the bank was to obtain was against the unfaithfulness of the warehouseman Weaver, and that his signature was to be accompanied by that of an officer of the Kendrick Company, to make more certain the fact that Weaver would issue only honest warehouse receipts. In other words, the surety company guaranteed to the bank the good conduct of both Weaver and the Kendrick Company. To hold the bank responsible for the conduct of the Kendrick Company in not giving notice to the

surety company, that servant was defrauding the bank, would be to place upon the latter a need of watchfulness and oversight of the workings of the Kendrick Company which would not only be practically impossible to the bank, but, if exercised, would render wholly useless the guaranty or insurance contracted for. The parties, therefore, could never have intended to enter into an arrangement of that kind. Certainly it is true that the failure of the employer to discharge the duties prescribed would in case of a loss caused by the fault of the bonded servant prevent any recovery on the employer's part against the surety company in case of recovery by the bank against the employer. But as between the bank and the surety company would this be the true result? It is said in the rider: "It is specifically conditioned by the surety company that the only warehouse receipts referred to are such as may be signed by the employee as warehouseman in conjunction with an officer of the employer." It would seem that as between the bank and the surety company all the former was required to do was to see that the warehouse receipts were so signed, and that they did not exceed altogether more than $40,000 face value. The whole contract could then stand together. The provision referred to, as regards the duties of the employer, would be binding as between the employer and the surety company, but not applicable to the bank. Under this construction the exact terms of the bond and of the rider would be brought into harmony, and would, as it seems to us, express the specific purpose,

as well as the general purpose, of the whole instrument. Any other view would make the rider and the body of the bond a misfit. Under this construction the whole bond can stand, and the bond and the rider can stand together. Under a construction making the bank responsible for the failure of duty on the part of the employer, language adapted only in the bond to the employer would be violently wrenched so as to be made applicable to the bank, and practically to defeat the specific purpose of insuring the bank. What has just been said is equally applicable to the other specifications in the assignments quoted, and they need not be more particularly referred to.

The next question that arises is as to the extent of the recovery. Is the complainant entitled to the full face of the bond, $40,000? We think not. Its action, while in form for enforcement of a contract, is in substance and effect an action for fraud practiced on it by the bonded employee Weaver. To justify a recovery, there must not only be fraud but damage as well. Obviously the amount of the recovery must be measured by the amount of the damage or injury. It is admitted in the bill, as shown by the excerpt which we have made from it, that there was some grain to cover in part nearly all the several warehouse receipts therein mentioned. To the extent of the value of the grain so in store at the date of the issuance of each receipt, there was absence of injury. The complainant's damages would therefore be measured by the difference between the market value of the grain so in store,

at the dates mentioned, and the market value of the total amount represented in each receipt as being on hand to cover that receipt. These values appear in the record, and the result can be ascertained by mere calculation. The measure of damages we have stated is in substance that applied in *Hindman* v. *First National Bank,* 112 Fed., 931, 50 C. C. A., 623, 57 L. R. A., 108, 114, with the distinction that market value is applicable in the case before us, the subject-matter being tangible property, not shares of stock as in the case referred to. *McDonald* v. *Unaka Timber Company,* 88 Tenn., 38, 43, 45, 12 S. W., 420; *Paragon Refining Co.* v. *Lee Bros.,* 98 Tenn., 643, 41 S. W., 362; *Cole* v. *Zucarello,* 104 Tenn., 64, 56 S. W., 850.

It is not material, in the present action, that the Kendrick Company subsequently disposed of all of the grain, and when demand was made in July, 1909, several months after the warehouse receipts had been issued for this grain, there was none on hand to meet it. The representation made by Weaver must be tested by the facts as they existed at the date each certificate or receipt was issued by him. By this the liability of the surety company would be not only fixed, but limited. That liability could not be increased by subsequent acts of the Kendrick Company in disposing of the grain. It is true the Kendrick Company would be liable for such subsequent disposition, as a conversion of the property. But the bond did not bind the surety company to see to it that the grain covering the receipts should remain in the warehouse for four months

and over, but only that the receipts should truly represent grain when issued. When so set apart, it is true, as understood between the bank and the Kendrick Company, the grain belonged to the bank for the purpose of its security; but it was in the custody of the Kendrick Company, to which the warehouse belonged. Weaver was not a warehouseman in the sense of being the owner of the warehouse, nor did he have any control of shipments. The record shows that the warehouse belonged to the Kendrick Company, and Weaver was only its employee. It was not a public bonded warehouse, under our statute, but merely the private warehouse of the Kendrick Company, used as an adjunct to its grain business.

Perhaps it is unnecessary to remark that the result would be quite different if the present bill were one for rescission. In such a case, of course, the bank could repudiate the receipts wholly, if there was not grain behind them to the full extent represented. But this suit must stand on different principles.

The next question is whether the complainant is entitled to recover anything on the penalty sued for.

As we have already declared, bonds of the kind sued on are treated as insurance contracts. Our statute provides that in suits on such contracts a penalty of not exceeding 25 per cent. of the liability for the loss may be recovered provided the refusal to pay such loss was not in good faith. Acts 1901, ch. 141; *Continental Fire Ins. Co.* v. *Whitaker & Dillard,* 112 Tenn., 168, 169, 79 S. W., 119, 64 L. R. A., 451, 105 Am. St.

Rep., 916. From the *proviso* it is perceived that the penalty does not follow a recovery as a matter of course, and that the statute does not penalize insurance companies for defending suits brought against them, even though they should ultimately lose. They may defend in good faith, and we cannot say the surety company did not act in good faith in interposing its defense in the case before us. Without doubt there was enough in the case to justify a contest, seeing the difficulty attendant upon the construction of the contract as a whole, including the rider, and also the deduction that must be made from the amount sued for, in view of the fact that the warehouse receipts were not wholly unsupported by grain in store.

It is unnecessary to consider the questions made in the other assignments of error. They have all been sufficiently covered in what we have already said.

The chancellor's decree must therefore be reversed, in so far as he permitted a recovery for a penalty of $10,000. It must be modified as to the recovery of $40,000 on the bond, so as to reduce that recovery by the market value of the grain in store for each of the warehouse receipts described in the bill, at the date of each receipt, as shown in the bill.

The costs will be divided between the parties in the proportion of three-fourths against defendant company and Joseph H. Weaver, and one-fourth against complainant.

DURHAM *v.* STATE.

(*Nashville.* December Term, 1913.)

1. **CRIMINAL LAW. Evidence. Character of accused.**

Where, in a prosecution for murder, accused testified as a witness and introduced evidence as to his good character for truth and veracity as a witness, this was not evidence of, nor did it put in issue, his character for peace or quietness. (*Post*, *pp.* 637, 638.)

Case cited and approved: Powers v. State, 117 Tenn., 363.

2. **CRIMINAL LAW. Character of accused. Instructions.**

Where, in a prosecution for murder, accused did not introduce evidence as to his good character for peace and quietness, the court properly overruled his request to charge that there was a presumption of his good character which stood as a witness for him, and should be looked to by the jury as having effect upon reasonable doubt of his guilt, since, though there was a presumption of his good character in the sense that, in the absence of proof, the jury was not warranted in assuming that he was of bad character, it was not such a presumption as could be made the basis of inference to strengthen his presumption of innocence and thereby the resultant—reasonable doubt. (*Post*, *p.* 638.)

Cases cited and distinguished: Mullen v. United States, 106 Fed., 892; Coffin v. United States, 156 U. S., 432; People v. Johnson, 61 Cal., 142; Addison v. People, 193 Ill., 405.

Cases cited and approved: Phelan v. State, 114 Tenn., 483; People v. Bodine, 1 Denio (N. Y.), 281; Danner v. State, 54 Ala., 127; People v. Bonier, 103 Am. St. Rep., 897.

FROM SUMNER.

Error to Circuit Court, Sumner County.—W. L. COOK, Judge.

ED. T. SEAY, BASKERVILLE & COLLIER, and J. T. DURHAM, for plaintiff in error.

Durham v. State.

Wm. H. Swiggart, Jr., Assistant Attorney-General, for the State.

Mr. Justice Williams delivered the opinion of the Court.

Plaintiff in error, Durham, was tried and convicted of murder in the second degree. His defense was self-defense; and he has appealed and assigned numerous errors, one only of which will be treated and disposed of in this opinion.

The trial judge in his charge to the jury said:

"Every defendant is entitled to the benefit of his good character when it is shown in proof. If the good character of the defendant, considered in connection with the other proof, creates a reasonable doubt of his guilt, you should acquit."

The defendant submitted the following request to charge, which was refused, and therefor error is assigned:

"I further charge that the defendant is presumed to have a good character until the contrary is shown by competent evidence, and this good character stands as a witness for him and in his favor upon every issue in the case. The defendant is always entitled to the benefit of his good character, and the jury may look to this, with the other evidence, to see whether there is a reasonable doubt as to his guilt."

The defendant had offered no testimony to show his good character for peace and quietness; but he did testify in his own behalf, and offered evidence in sup-

port of himself as a witness to the effect that his character for truth and veracity was good.

It is insisted for the State that defendant thus put his character in evidence, and is not, on that account, entitled to the law's presumption of a good character, since a presumption is operative only in the absence of proof. In this there is a failure to distinguish between the good character of an accused (for peace and quietness) and the good character of an accused as a witness (for truth and veracity). *Powers* v. *State*, 117 Tenn., 363, 97 S. W., 815. The putting by a defendant of the latter to proof cannot have the effect of putting with it the former, against his intent and interest.

So that we are of opinion that there is nothing in this counter insistence of the State that embarrasses the defendant in his reliance upon the error assigned, the purport of which is that there is a presumption of a good character in favor of an accused which, as would a fact, stands as a witness for him, to be looked to by the jury as having effect upon reasonable doubt of his guilt, even where he does not offer to set up a good character for peace and quietness.

The contention does not lack support of authority that is entitled to great consideration. The circuit court of Appeals of the sixth circuit, in Mullen v. United States, 106 Fed., 892, 46 C. C. A., 22, in an opinion by Mr. Justice Day, then circuit judge, dealt with a like contention. There the trial judge refused a request to charge as follows:

"You are charged that the law presumes the good character of the accused, and such presumption is to be considered evidence in favor of the accused in considering the question of his guilt or innocence."

The court held that it was error to refuse this request, and said:

"The comment of the judge in his charge and the several refusals to charge in the exceptions noted raise the question whether in a criminal trial, in a court of the United States, where no testimony has been offered as to the previous good character of the accused, a presumption of such good character exists in favor of the accused, of which, upon a request to that effect, the jury should be instructed. The supreme court of the United States, dealing with the presumption of innocence in criminal trials, in the case of *Coffin v. United States,* 156 U. S., 432, 460, 15 Sup. Ct., 394, 405, 39 L. Ed., 481, 493 (opinion by Mr. Justice White) said:

"'The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as a *presumptio juris,* demonstrates that it is evidence in favor of the accused; for in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy.'

"This reasoning applies to the presumption, if such exists, of good character of the accused, and should be given in the charge to the jury, where a specific re-

quest on that subject is made at the trial. Does such presumption exist? We fail to find any difference of opinion in the well-recognized text-writers upon this subject. All assert that a presumption exists in favor of the accused in the absence of testimony that he had a good character previous to the time of the alleged commission of the offense in question. It is true that the government may not attack the character of the accused until he puts it in issue by affirmative testimony on his part. He is not obliged to do this, but may, if he sees fit, rest upon the presumption raised by the law. . . .

"It is true that there are cases which hold that, where there is no testimony upon the subject, the court is not obliged to say anything to the jury, either one way or the other. But, if the presumption exists in favor of the accused, it cannot be available to him unless he can have an instruction advising the jury of this proposition of law. The presumption, to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of his innocence. It is in consonance with the general principle of law that a man is presumed to stand ordinarily well, and to have at least the average qualities of morality and good conduct."

In a learned opinion, Mr. Justice White, in *Coffin* v. *United States*, supra, as noted, undertook to demonstrate that the presumption of innocence is tantamount to evidence in favor of the accused, but further said: "The evolution of the principle of the presumption of

innocence, and its resultant, the doctrine of reasonable doubt, . . . indicates the necessity of enforcing the one in order that the other may continue to exist. While Rome and the Mediaevalists taught that, wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of the doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis.''

The argument of appellant is that the presumption of a good character should, treated as a law-assumed fact, strengthen the presumption of innocence, and thereby strengthen that which is thus declared to be the resultant of the presumption of innocence—the reasonable doubt.

We deem the error in this contention and in the authority relied on in its support to be in assuming that the presumption of good character may be conceived of as not incorporated in and as a part of the presumption of innocence, and that it may be resorted to as an independent probative element to reinforce the presumption of innocence with like effect upon its resultant—the doubt. When the law affords to an accused the presumption of innocence, that, in its inclusive nature, tends to produce the resultant doubt. Neither that presumption nor its resultant is to be strengthened by the other or included presumption, but the production by defendant of *proof* of the

fact of good character, in lieu of the presumption, may operate to increase the weight of the presumption of innocence and, therefore, the doubt. *Phelan* v. *State*, 114 Tenn., 483, 507, 88 S. W., 1040, and cases in accord.

But, when so produced, the proof is perforce in lieu of the presumption. If each be truly probative in nature, would this be the case?

At least two learned authors, in their treatises on the law of evidence, deny that the presumption of innocence (and of course the presumption of good character) is of probative force or is to be weighed as evidence, and criticise the opinion delivered by Mr. Justice White as follows: "The presumption may in a sense be called an instrument of proof or something in the nature of evidence, in that it determines from whom evidence shall come; or it may be called a substitute for evidence, in the sense that it counts at the outset for evidence enough to make a *prima facie* case; but it is not evidence in the true sense. It is not probative matter, which may be a basis of inference and weighed and compared with other matter of a probative nature." 1 Elliott, Ev., sec. 93; Thayer's Prelim. Treatise Ev., 575; 3 Harvard Law Review, 148-166.

We think it clear, under either view, if, indeed, the views are divergent and may not, on a true analysis of the opinion of Mr. Justice White, be harmonized, that the presumption of a good character may not be a basis of inference for the purpose of adding weight to the presumption of innocence or its logical result-

ant. One presumption may not supplement to augment another, where one is but a part of the other.

Several courts have had the point urged on us for error under review, and their opinions demonstrate the unsoundness of the decision in *Mullen* v. *United States,* supra, and the unfairness of its rule in application.

McKinstry, J., in *People* v. *Johnson,* 61 Cal., 142, said: "If, in the absence of evidence on the subject, the presumption of good character is to weigh as much in his [accused's] favor as affirmative proof of it, the necessity of proving good character would never arise; and the prosecution would frequently be in a worse case than if evidence of good character had been given, since the prosecution would be debarred from introducing evidence to overcome the presumption. When it is said that good character is to be presumed, it is only said that, in the absence of evidence, the jury should not attribute to defendant a general bad character with respect to the qualities involved in the alleged offense, nor give weight to his assumed bad character in determining the question whether the evidence established his guilt."

In *Addison* v. *People,* 193 Ill., 405, 419, 62 N. E., 235, 239, in reference to a request to charge, submitted by defendant, "that the law not only presumes that the defendant is innocent until he is proven guilty beyond any reasonable doubt, but the law also presumes that the defendant has a good character . . . as a law-abiding, peaceable citizen until the contrary is shown

by the evidence, and it is not necessary for the defendant to prove his reputation in that respect, . . . and that, without any proof on the subject, the jury should take the good character of defendant into consideration in making up their verdict," the court, after reasoning as did the California court, further said: "Defendant did not choose to put his reputation in issue or prove that it was good, but sought by the instruction all the benefit of an affirmative finding of such fact without proof or an opportunity to combat the claim or prove the negative. If the instruction were the law, a defendant need never prove good reputation, but could take the benefit of the proof which . . . he could not make." See, also, *People* v. *Bodine*, 1 Denio (N. Y.), 281, 315; *Danner* v. *State*, 54 Ala., 127, 25 Am. Rep., 662.

We therefore rule that the accused was not entitled to have the request charged.

By this it is not to be understood that there is no presumption of good character in favor of a defendant in a criminal prosecution as above outlined, and also in the sense that, in the absence of proof on the subject, the jury is not warranted in assuming that he is of bad character in respect of the particular trait or quality involved in the alleged crime, which, as seen above, is peace and quietness, in a prosecution for homicide. *Powers* v. *State*, supra; *People* v. *Bonier*, 103 Am. St. Rep., 897, annotation.

Other assignments of errors are disposed of in the judgment entered. Affirmed.

TENNESSEE FERTILIZER Co. *et al.* *v.* McFALL *et al.*

(*Nashville.* December Term, 1913.)

1. **CONSTITUTIONAL LAW. Taxation. Due process of law. Tax proceedings. Hearing. Interested party.**

Revenue Act 1907, ch. 602, sec. 30, requiring back tax proceedings to be instituted and heard before the county trustee, whose compensation, by section 48, is made to depend on the amount adjudged to be due from the taxpayer in such proceedings, does not for that reason deprive the taxpayer of due process of law in that the trustee is a party in interest, nor is the taxpayer for that reason deprived of a hearing in accordance with the "law of the land." (*Post*, *pp.* 649, 650.)

Acts cited and construed: Acts 1907, ch. 602, sec. 30.

Constitution cited and construed: Art. I., sec. 8.

Case cited and approved: Grundy County v. Tennessee Coal, etc., Co., 94 Tenn., 295.

2. **CONSTITUTIONAL LAW. Back taxes. Assessment. Hearing before assessing officer.**

It is not necessary that the statute providing for the assessment of back taxes should provide the taxpayer with an opportunity for hearing before the county trustee making the assessment; it being sufficient that the taxpayer is given an opportunity to appeal to the board of equalization and that he is afforded an opportunity to review the proceedings of the board in the courts by *certiorari*. (*Post*, *p.* 652.)

Acts cited and construed: Acts 1907, sec. 30.

Case cited and distinguished: E. Tenn. Brewing Co. v. Currier, 126 Tenn., 535.

Cases cited and approved: McMillen v. Anderson, 95 U. S., 37; Paulsen v. Portland, 149 U. S., 30; Winona & St. Paul Land Co. v. Minnesota, 159 U. S., 526; Palmer v. McMahon, 133 U. S., 660.

3. CONSTITUTIONAL LAW. Due process of law. Back tax proceedings. Notice.

The notice required to be given to a taxpayer in back tax proceedings required by Acts 1907, ch. 602, being such as to advise the taxpayer that back assessment proceedings are to be begun against him, is sufficient; the burden being on him to show that he has paid taxes on all his property at a fair valuation. (*Post*, *p.* 655.)

4. CONSTITUTIONAL LAW. Assessment. Back taxes. Notice.

Where property owner actually participated in proceedings to make an assessment of back taxes against his property, he could not thereafter complain that the statute did not provide for a sufficient notice of the proceedings. (*Post*, *p.* 655.)

Cases cited and approved: Williams v. Eggleston, 170 U. S., 304; C., B. & Q. R. Co. v. Nebraska, 170 U. S., 57; Security Trust & Safety Vault Co. v. Lexington, 203 U. S., 323.

5. CONSTITUTIONAL LAW. Due process of law. Back tax proceedings. Notice. Time.

The 10 days' notice provided by Revenue Act 1907, ch. 602, for an appeal from a county trustee's back tax assessment to the board of equalizers, was long enough to constitute due process of law. (*Post*, *p.* 656.)

Cases cited and approved: Bellingham Bay & B. C. R. Co., v. New Whatcom, 172 U. S., 314; Ballard v. Hunter, 204 U. S., 241.

6. JUDGES. Judicial officers. County trustee. Compensation. Back tax proceedings.

The county trustee in making assessments of back taxes as provided by Revenue Act 1907, ch. 602, is not a judge of the Supreme or inferior courts, but exercises *quasi* judicial authority only, and is therefore not within Const. art. 6, secs. 7, 11, providing that such judges shall at stated times receive compensation for their services and shall not be allowed any fees or perquisites and shall not preside in the case in the event of which he may be interested. (*Post*, *p.* 656.)

Constitution cited and construed: Art. 6, secs. 7, 11.

Case cited and approved: Grundy County v. Tenn. Coal, etc., Co., supra.

7. CONSTITUTIONAL LAW. Departments of government. Judicial powers. County trustee. Revenue Act 1907, ch. 602, in so far as it vests *quasi* judicial authority in back tax proceedings on the county trustee, was not violative of Const. art. 6, sec. 1, vesting the judicial power of the State in the Supreme and other specified courts. (*Post*, *p.* 657.)

Acts cited and construed: Acts 1907, sec. 30.

Constitution cited and construed: Art. 6, sec. 1.

8. TAXATION. Back assessment. Statutes. Application.

Revenue Act 1907, ch. 602, in so far as it provides for the back assessment of taxes, merely undertakes to provide a new remedy for the collection of taxes already delinquent at the time of its passage, and hence taxes on omitted property accruing prior to the adoption of the act were recoverable thereunder. (*Post*, *p.* 658.)

Case cited and approved: League v. Texas, 184 U. S., 156.

9. TAXATION. Manufacturing corporations. Assessment of stock. Exemption.

Revenue Act 1907, ch. 602, sec. 8, provides that all personal property shall be assessed under certain classes, class 6 including shares of stock, except when the corporate property or capital stock is assessed, in lieu of the shares of stock, as provided in section 22, which declares that each manufacturing corporation, whether foreign or domestic, shall pay an *ad valorem* on the actual cash value of its capital stock or corporate property, including franchises, easements, incorporeal rights and privileges, and all other corporate property, which shall not be less than the actual cash value of both its shares of stock and its bonded debt, etc. *Held*, that it was the legislative intention under such act to assess the capital stock and corporate property of all manufacturing corporations, whether foreign or domestic, and hence the shares of such corporations so assessed were exempt from further taxation. (*Post*, *pp.* 659, 660, 661.)

Acts cited and construed: Act 1907, ch. 602, secs. 8, 21-24; Acts 1897, ch. 5; Acts 1903, ch. 258, 22-24.

Case cited and distinugished: Express Co. v. Patterson, 122 Tenn., 279.

Cases cited and approved: Bank v. Memphis, 101 Tenn., 154; Carroll v. Alsup, 107 Tenn., 257; Briscoe v. McMillan, 117 Tenn., 126.

FROM MAURY.

Appeal from Chancery Circuit Court, Maury County. —W. S. BEARDEN, Chancellor.

HOLDING & GARNER, E. H. & C. P. HATCHER, and C. OWEN, for Tennessee Fertilizer Co.

J. W. FOWLER, O. K. HOLLADAY, PEEBLES & FORGEY, and T. B. LITTLE, for McFall.

MR. JUSTICE GREEN delivered the opinion of the Court.

The bill in this case was filed by the Tennessee Fertilizer Company and J. H. Carpenter, executor of W. J. Howard, deceased, to enjoin certain proceedings begun by the revenue agent to back assess shares of stock in the Tennessee Fertilizer Company belonging to the estate of said Howard. The Tennessee Fertilizer Company is an Alabama corporation doing part of its business in this State.

Certain proceedings were had before the chancellor not necessary to be detailed, and he held the shares

of stock liable for taxes for the years 1907, 1908, 1909, and 1910. From this decree J. H. Carpenter, executor, has appealed. The chancellor disallowed certain penalties and interests claimed by the revenue agent, and from that portion of his decree the revenue agent has appealed.

Five assignments of error relating to matters of practice and procedure have been filed by the executor which it is not worth while to discuss in this opinion. These assignments are overruled.

Assignments of error 5 to 12, made by the executor, challenge the constitutionality of chapter 602 of the Acts of 1907; same being the Revenue Act of that year. The act is assailed on various grounds. Most of the questions made in these assignments of error have been heretofore considered and determined adversely to the contention of Carpenter, and in disposing of them it will be necessary to do little more than refer to decisions of this court and of the Supreme Court of the United States in cases in which like objections were made to the different revenue acts of this and other States.

The fifth assignment of error is that the chancellor erred in holding the act was not in violation of the fourteenth amendment to the Constitution of the United States, for that by section 30 of said act back assessment proceedings were to be instituted and heard before the trustee, and by section 48 of said act the trustee's compensation for such services was dependent upon the amount adjudged to be due from

the taxpayer in these proceedings for back assessment. It is insisted that the trustee is an interested party, and taxpayers are deprived of due process of law in being forced to trial before him under such circumstances.

This contention is overthrown by the supreme court in the case of *Hibben v. Smith*, 191 U. S., 310, 24 Sup. Ct., 88, 48 L. Ed., 195, where it was held that an owner of property which was assessed for local improvement was not denied due process because two members of the board of assessors were owners of lots abutting on the improvement and assessable therefor, and thus directly interested in said assessment. The court held that a board so constituted was not analogous to a judge of a court who sat in a case in which he was personally interested.

The sixth assignment is that the chancellor erroneously held section 30 of this act not to be in conflict with section 8, art. 1, of the Constitution of Tennessee. It is urged that, because of the interest of the trustee just referred to, proceedings before him in a matter of this kind are not in accordance with the "law of the land."

The same argument was made in *Grundy County* v. *Tennessee Coal, etc., Co.*, 94 Tenn., 295, 29 S. W., 116. Under the Assessment Act, there construed, the compensation of the tax assessor was fixed in proportion to the amount of taxes assessed, collected and paid over. In response to a similar attack on that statute, this court said:

"If this position be tenable and the result as claimed, then it is evident that all our laws in regard to the assessment of property for purposes of taxation are, and have been for a series of years, unconstitutional, for they all give to the assessor a certain per cent. upon property assessed by him for his services, and his compensation is thus made to depend upon the amount of property assessed and valuation placed upon it by him. (See the last act of extra session 1890, chapter 30, sec. 1.) A similar rule prevails in regard to trustees in assessing picked up taxes.

"Whatever may be said of the unwise policy of providing that the assessors shall receive a compensation regulated by the amount and value of the property assessed by them, it is evident that it has been adopted in our legislation, and must stand, unless it is inhibited by constitutional provisions. While the assessor, in the discharge of his duty, exercises a judicial or *quasi* judicial function, still he is not a judge of a supreme or inferior court in the sense of the constitutional provision, and that provision cannot be held to apply to such offices, because not in the letter of the inhibition." *Grundy County* v. *Tennessee Coal, etc.*, supra.

An effort is made to distinguish the present case from the case of *Grundy County* v. *Tennessee Coal, etc., Co.*, supra. Under the statute considered in that case, the assessor was only clothed with power to back assess and determine the value of the property. Suit was brought upon his assessment. He was not em-

powered as is the trustee by the Act of 1907 to proceed himself to collect the assessment levied. This difference between the two acts furnishes no ground upon which to base a substantial distinction. The essentially judicial feature of the power conferred under both acts was the determination of the value of the property. That is the only act which involves judicial discretion. Having determined the value of the property, and it being permissible for him so to do upon the authority of *Grundy County* v. *Tennessee Coal, etc., Co.*, supra, the other duties imposed upon the trustee by the Act of 1907 are ministerial or clerical in their nature rather than judicial.

The seventh assignment of error is to the same effect as the sixth, just discussed.

As a further answer to these assignments of error, it is proper to observe that under the decision of this court, and of the supreme court of the United States, it was not necessary for the statute to provide any opportunity at all for the hearing of the taxpayer by the trustee. The proceedings of the trustee might have been *ex parte* without notice to the taxpayer and without his presence or participation, and inasmuch as the taxpayer is given by the terms of the act an opportunity to appeal from the trustee's action to the board of equalization, and has the further opportunity to obtain a review of the proceedings before the board of equalization in the courts, by *certiorari*, there is no room for him to complain. All he can demand is that at some stage of the proceedings he be given an op-

portunity to be heard and present his rights before an impartial tribunal. Inasmuch as he has no constitutional right to any hearing at all in the initial proceedings before the trustee, it follows that he cannot be heard to say the trustee was incompetent, under the constitution.

In the late case of *East Tennessee Brewing Co.* v. *Courier*, this court considered the constitutionality of that section of the act of 1907, authorizing county court clerks, when it came to their knowledge that any person was in possession of a federal liquor dealer's license, to proceed summarily against such person by distress warrant without notice, and seize his property for subjection to the payment of the liquor dealer's license exacted by the State. We upheld the validity of this provision of the act, and, after a review of the cases, said:

"From all the authorities, it is evident that the State has the power to assess taxes and fix methods for the collection thereof, and it does not matter if these remedies be summary in their nature, so long as the taxpayer is in some way, at some stage of the proceedings, given an opportunity to be heard and have his rights determined before some competent tribunal.

"The statute in this case directed the issuance of a distress warrant upon certain conditions made to appear to the clerk of the county court.

"The statute might have prescribed that notice be given to the delinquent taxpayer before the issuance

of a warrant; but the legislature did not see proper to include such a provision, and it was entirely within their power to omit it, inasmuch as the taxpayer has open to him the several methods, heretofore pointed out, of calling in question the validity of the demand made against him." *E. Tenn. Brewing Co.* v. *Currier,* 126 Tenn., 535, 150 S. W., 541.

In the above case the property of the delinquent taxpayer was actually seized under the statute without notice to him; but inasmuch as he was given an opportunity to have his rights determined later, we held, upon the authorities, that he was not deprived of due process.

This holding is in exact accord with that of the supreme court of the United States.

It is held in *McMillen* v. *Anderson,* 95 U. S. 37, 24 L. Ed., 335, that the revenue laws of the State may be in harmony with the fourteenth amendment to the United States Constitution, although they do not provide for the presence of a person when a tax is assessed against him, or that the tax should be collected by suit.

If a provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of an assessment should be assessed upon his land, there is no taking of his property without due process of law, although the public improvement for which it is imposed was made without notice to him. *Paulsen* v. *Portland,* 149 U. S., 30, 13 Sup. Ct., 750, 37 L. Ed., 637.

Opportunity to question the validity or the amount of the tax, either before the amount is determined or in subsequent proceedings for its collection is sufficient to make due process of law in the imposition of a tax or assessment upon property according to its value. *Winona & St. Paul Land Co.* v. *Minnesota,* 159 U. S., 526, 16 Sup. Ct., 83, 40 L. Ed., 247.

When the law provides for a mode of confirming or contesting assessment of taxes by a board of revision whose action can be reviewed on *certiorari* with due notice to the person assessed, the assessment does not deprive the owner of his property without due process of law. *Palmer* v. *McMahon,* 133 U. S., 660, 10 Sup. Ct., 324, 33 L. Ed., 772.

Under the eighth assignment of error the act is sought to be held in violation of the fourteenth amendment to the federal constitution because the notice provided by the statute is insufficient. We do not think this contention is well taken. The notice advises the taxpayer that back assessment proceedings are to be begun against him, and, if he is able to show that he has paid taxes on all his property at a fair valuation, he cannot be hurt. He knows what property he has, and he knows its value, and should come prepared to prove these things, and that he has paid his taxes. Furthermore, inasmuch as this taxpayer actually participated in this back assessment proceeding, he cannot be heard to complain nor attack the statute because of any want of notice. *William* v. *Eggleston,* 170 U. S., 304, 18 Sup. Ct., 617, 42 L. Ed., 1047; *C., B. & Q. R.*

Co. v. *Nebraska,* 170 U. S., 57, 18 Sup. Ct., 513, 42 L. Ed., 948; *Security Trust & Safety Vault Co.* v. *Lexington,* 203 U. S., 323, 27 Sup. Ct., 87; 51 L. Ed., 204.

Another point made under this assignment is that the provision of the act allowing only ten days in which to appeal to the board of equalizers is unreasonable and in conflict with the idea of due process. The supreme court of the United States has held that such a period of time is not so short as to be insufficient for due process. *Bellingham Bay & B. C. R. Co.* v. *New Whatcom,* 172 U. S., 314, 19 Sup. Ct., 205, 43 L. Ed., 460; *Ballard* v. *Hunter,* 204 U. S., 241, 27 Sup. Ct., 261, 51 L. Ed., 461.

The ninth assignment is that the act of 1907 violates article 6, section 7, of the constitution, in which it is provided that the judges of the supreme and inferior courts shall at stated times receive compensation for their services, and shall not be allowed any fees or perquisites.

The argument is that, the trustee being a judicial officer in back assessment proceedings, it is illegal to allow him compensation in the way of fees based upon the amount of property assessed by him. *Grundy County* v. *Tenn. Coal, etc., Co.,* as we have seen, answers this contention. It was therein expressly held that a trustee, although clothed with *quasi* judicial authority in such matters, was not a judge of the supreme or inferior courts as those terms are used in the constitution.

The tenth assignment urges that the act violates article 6, section 11, of the constitution of Tennessee, providing that no judge of the supreme or inferior courts shall preside in a case in the event of which he may be interested.

What has been said in reply to the preceding assignments answers this contention. The trustee is not a judge of the supreme or inferior courts. *Grundy County* v. *Tenn. Coal, etc., Co.*, supra.

The eleventh assignment raises the point that the act violates section 1, art. 6, of the constitution of Tennessee, providing that the judicial power of the State shall be vested in the supreme court, and in such circuit, chancery, and other inferior courts as the legislature may establish, and in justices of the peace.

It is argued that by reason of the provisions of this section of the constitution, the legislature was without power to commit judicial authority to the trustee, such as given him by the act in question.

It has been customary for many years to clothe the trustee with powers like these, and, while the exercise of such powers is judicial in character, this court has uniformly upheld such legislation and refers to the trustee as a *quasi* judicial officer. That is to say, the authority conferred upon him is not judicial in the sense of the constitution, but *quasi* judicial upon our cases.

The twelfth assignment of error challenges generally the constitutionality of section 30 of the act of 1907, and

is a mere grouping of the several constitutional attacks which we have already considered. It is therefore overruled without further discussion.

The thirteenth assignment raises the question that the trustee was without authority to back assess omitted property under the provisions of the act of 1907. This contention finds no ground upon which to rest as we view the act. Back assessment of omitted property is provided for in the first clause of section 30, and also in the citation, and counsel are not warranted in selecting from section 30 a particular passage and saying that omitted property is not included in the provision for back assessment because not included within this particular passage.

Under the fourteenth assignment, it is contended that the trustee had no power to back assess property for the year 1907.

The fifteenth assignment is to the same effect.

It is urged that inasmuch as this act was not passed until April, 1907, taxes which accrued January 10, 1907, could not be back assessed thereunder. There is nothing in this argument. The statute merely undertakes to provide a new remedy for the collection of taxes already delinquent at the time of its passage. There is nothing irregular or unconstitutional in such provision. *League* v. *Texas*, 184 U. S., 156, 22 Sup. Ct., 475, 46 L. Ed., 478.

The remaining assignments of error filed by Carpenter make the point that the Tennessee Fertilizer Company is a manufacturing corporation, and that un-

der the provisions of chapter 602 of the Act of 1907 shares of stock of such a corporation are not assessable. These assignments of error are well made and must be sustained.

Without entering into a discussion of the facts, we find that the Tennessee Fertilizer Company is a manufacturing corporation. It is likewise a foreign corporation, being chartered under the laws of the State of Alabama.

In the act of 1907 are the following provisions:

"Section 8. Be it further enacted, that all personal property of every kind shall be assessed under the following classification: . . .

"Class 6. All bonds, except United States bonds, and all shares of stock, except when the corporate property or capital stock is assessed in lieu of the share of stock as hereinafter provided in section 22 of this act."

Here is a plain exclusion from assessment of shares in corporations whose corporate property or capital stock is assessed as provided in section 22. The language used is a declaration that the mode of corporate assessment provided in section 22 is in lieu of assessment upon shares of stock. It is immaterial that section 22 does not again declare that the assessment therein provided for shall be in lieu of assessment upon shares of stock. That would be a mere repetition as suggested by counsel.

Turning to section 22, we find it provided that 'each manufacturing corporation, either foreign or domestic, shall pay an *ad valorem* upon the actual cash value

of its capital stock or corporate property, including its franchises, easements, incorporeal rights and privileges, and all other corporate property, which said value shall not be less than the actual cash value of both its shares of stock and its bonded debt, and which said value shall be computed by looking to and considering the market value, etc."

Section 23, which is merely a continuation of sections 21 and 22, and an effort to make more explicit the provisions of sections 21 and 22, contains particular and exclusive language respecting the assessment of foreign manufacturing corporations as follows:

"Foreign corporations mentioned in sections 21 and 22 having branch factories or business in this State shall only be assessed on the actual cash value of the corporate property in this State; provided, however, the franchise and intangible property of the corporation in this State shall be included in the valuation of the corporate property in the State."

There can be no doubt upon consideration of these sections of the act of 1907, but that it was the intention of the legislature to assess the capital stock and corporate property, tangible and intangible, of all manufacturing corporations, foreign or domestic, and shares of stock in corporations so assessed are expressly excluded from assessment by the provisions of section 8 heretofore noted.

It is within the power of the legislature to assess corporations upon their corporate property and capital stock excluding the shares of stock, or it is within

the power of the legislature to assess shares of stock in lieu of corporate property and capital stock. The latter method of assessment was adopted in section 24 of the act of 1907, respecting banking associations and other corporations therein named. Either mode of assessment is valid, and neither can be regarded as unlawfully exempting corporate property from taxation. The two plans are merely different methods of assessment of corporate property. *Bank* v. *Memphis,* 101 Tenn., 154, 46 S. W., 557; *Carroll* v. *Alsup,* 107 Tenn., 257, 64 S. W., 193.

As to manufacturing corporations, both domestic and foreign, the legislature undertook to assess capital stock and corporate property in lieu of shares of stock.

It was held in *Express Co.* v. *Patterson,* 122 Tenn., 279, 123 S. W., 353, that this effort, in so far as it was sought to reach the intangible property of foreign corporations, had failed because no provision was made fixing the *situs* of the intangible assets of such corporations, and no method was pointed out for ascertaining the value of such intangible assets and assessing them for taxation. This was all that was decided in *Express Co.* v. *Patterson,* supra.

It is insisted by counsel for the revenue agent that inasmuch as all of the corporate property of such foreign corporations cannot be reached under the holding of *Express Company* v. *Patterson,* and the design of sections 21, 22, and 23 cannot be accomplished, the court should hold that shares of stock in these cor-

porations are assessable under section 24, which provides for assessment of shares of stock in banks, etc., and companies "other than such as are defined and assessable under sections 21 and 22 of this act." It is urged that under *Express Co.* v. *Patterson,* foreign corporations are not covered by sections 21 and 22 and should therefore be held to fall within section 24.

We cannot agree to this argument. As stated in *Express Co.* v. *Patterson,* supra, and other cases, the constitutional provision requiring all property to be taxed is not self-executing. The legislature must devise plans for putting this mandate of the constitution into effect. Unquestionably the legislature did undertake to provide for the assessment of all the corporate property, tangible and intangible, of foreign manufacturing corporations, in so far as said property was located in this State. It is equally clear that it was intended to omit from assessment shares of stock in such corporations.

As pointed out in *Express Co.* v. *Patterson,* supra, this effort of the legislature to assess the corporate property of foreign corporations has failed in so far as their intangible property is concerned, because no scheme is provided for ascertaining the value of such property and fixing its *situs.* This failure is to be regretted, but the remedy is with the legislature.

This court has no power to levy an assessment or to devise a scheme of taxation. The court cannot hold shares of stock in foreign corporations liable to assessment merely because the effort of the legislature to

assess the property of such corporations in another manner has proven partially ineffectual.

There is no conflict between what we have said and the language used in *Express Co.* v. *Patterson,* supra. In that case, speaking with reference to the Southern Express Company, a *quasi* public corporation, the court expressed the opinion that it was not the intention of the legislature to provide in sections 22, 23, and 24 of chapter 258 of the Acts of 1903 for the assessment of its intangible property. These sections of the act of 1903 are similar to the same sections of the act of 1907. The court was referring only to the express company, a *quasi* public corporation. The property of such corporations is ordinarily assessed by the railroad commissioners, under the provisions of chapter 5 of the Acts of 1897, and this court thought it was not the intention of the legislature to discriminate against express companies and require a mode of assessment for their property different from the manner of assessing property of like corporations. Therefore it was said that these sections of act of 1903 did not apply to complainant in that case.

Obviously, the sections of the act of 1907 which we have heretofore noticed, in so far as the intention to assess is concerned, do apply to foreign manufacturing corporations, such as the Tennessee Fertilizer Company, and there is no intimation to the contrary in *Express Co.* v. *Patterson,* supra.

We conclude that the act of 1907 contains no provision for the assessment of shares of stock in foreign

manufacturing corporations, and the proceedings before the trustee of Maury county by which this assessment was levied on shares of stock in the Tennessee Fertilizer Company were void. The complainant, Carpenter, is accordingly entitled to have such proceedings perpetually enjoined. *Briscoe* v. *McMillan*, 117 Tenn., 126, 100 S. W., 111; *Express Co.* v. *Patterson*, 122 Tenn. 279, 123 S. W., 353.

The decree of the chancellor is therefore reversed, and the injunction granted as prayed in the bill.

PER CURIAM.

Upon a full reconsideration, we are of opinion that the petition to rehear filed in this case by the revenue agent is not well taken, and it is accordingly denied.

BROWN & SONS LUMBER CO. *et al.* *v.* SESSLER.

(*Nashville.* December Term, 1913.)

1. **MASTER AND SERVANT. Injuries to third person. Death. Master's liability.**

Defendant lumber company maintained a sawmill in connection with which was a chute by which wood for fuel converted from slabs was taken from the saw. The wood was sold to draymen who loaded their wagons from the pile, for the protection of whom the lumber company had adopted a custom of requiring the employees who took out the large pieces to give a warning signal if by chance a large piece should go past him into the chute, and be liable to fall on the pile. While decedent, a customer, was loading his wagon at the pile, the employee in charge of the chute temporarily left it to warm himself, and, while absent, a large piece of wood passed over the chute without warning, and struck decedent, and caused injuries from which he died. *Held*, that decedent, being at the pile by the lumber company's invitation, was entitled to rely on the giving of a warning signal, and that defendant was therefore liable for his death resulting from a failure on the part of the employee to comply with the custom. (*Post*, *pp.* 667, 668.)

Cases cited and approved: Maness v. Clinchfield Coal Corporation, 128 Tenn., 143; Rosenbaum v. Shoffner, 98 Tenn., 624; Bennett v. Louisville, etc., R. Co., 102 U. S., 577; Sesler v. Coal Co., 51 W. Va., 322.

2. **MASTER AND SERVANT. Injuries to third person. Superintendent. Liability.**

Where the superintendent of a lumber company had no personal interest in the business, and was not present when decedent, a customer, was struck and killed through the negligence of a laborer employed by the company, and there was no claim that the superintendent was negligent in employing such laborer or retaining him in the service, the superintendent was not liable. (*Post*, *pp.* 669, 670, 671, 672.)

Cases cited and distinguished: Stone v. Cartwright, 6 Term Rep. (Durnf. & E.), 411; Brown v. Lent, 20 Vt., 529; Bileu v. Paisley, 18 Ore., 47; Thurman v. Pittsburg, etc., Copper Co., 41 Mont., 141.

Cases cited and approved: Ellis v. Southern Railway Co., 72 S. C., 465; Railroad v. Blair, 1 Tenn. Chy., 351, 63 Tenn., 407.

3. APPEAL AND ERROR. Joint judgment. Partial invalidity. Where, in an action for death against a lumber company and its superintendent, a joint judgment against both was not sustainable as against the superintendent, but was valid as against the lumber company, the latter was not entitled to have it set aside as to it. (*Post*, *pp.* 673, 674.)

Case cited and distinguished: Bentley v. Hurxthal, 40 Tenn., 378.

Cases cited and approved: Street Railway v. Gore, 106 Tenn., 390; Sparrow v. Bromage, 83 Conn. 27; Loveman v. Bayless, 128 Tenn., 307.

FROM DIXON.

APPEAL from Circuit Court, Dickson County.—W. L. COOK, Judge.

R. L. LEECH, JNO. J. VERTREES, and W. T. KANNARD, for appellants.

JNO. B. DANIEL and J. A. CLEMENT, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The plaintiff below, Susie V. Sessler, sued to recover damages for the wrongful death of her husband,

joining as defendants the lumber company and its manager, John M. Smith, and recovered judgment against both. On appeal to the court of civil appeals this judgment was affirmed, and a petition for *certiorari* has been filed to have reviewed in this court the judgment of affirmance.

The company operated a sawmill, and as a part of it a chute was in use to carry away from the mill, proper, wood for fuel converted from slabs. This chute was 160 feet long, and inclined from the saws upward, terminating at a distance of about 28 feet above the ground. The wood of various sizes was placed in the chute and conveyed by an endless revolving chain, and the smaller sizes were dumped into a pile that assumed a conelike shape at the far end of the chute.

The wood was sold to draymen who loaded their wagons from the pile. For their protection, the company kept one of its hands at work on a walkway that led up each side of the chute to take out of the chute the large pieces of wood, not suitable for stove wood, so that the draymen should not be endangered by such going over the end. By custom, this hand so stationed gave a warning signal "lookout" if by chance a large piece should go past him.

Sessler was at work loading his wagon when he was struck and killed by a large block fit only and intended for consumption in a boiler of an electric light plant, and therefore to be taken out of the chute and placed separate from the stove wood.

The hand located on the walkway, Beck, without the knowledge of Sessler, and of Manager Smith, who was 160 yards away engaged with a customer of the company, had left his post to go to a fire to warm, and while absent this particular piece, weighing approximately 100 pounds, passed over the chute. Smith, the manager, was not financially interested in the company.

These and further facts in relation to Sessler's position at the time, not to be here detailed, make a case of liability on the part of the company under the ruling of this court in the recent case of *Maness* v. *Clinchfield Coal Corporation*, 128 Tenn., 143, 162 S. W. 1105, and so aptly as not to require extended discussion.

The *Maness Case* involved liability for the wrongful death of an employee entitled to rely upon customary signals. Sessler was not an employee but was a customer of the lumber company, at the woodpile by its invitation, and was entitled to rely upon Beck's removing the block of wood in question or giving the warning signal. No sound differentiation can be made between an employee and such a customer for whose protection the guard had been placed, and the signal had been ordered. *Rosenbaum* v. *Shoffner*, 98 Tenn., 624, 40 S. W., 1086; *Bennett* v. *Louisville, etc., R. Co.*, 102 U. S., 577, 26 L. Ed., 235; *Sesler* v. *Coal Co.*, 51 W. Va., 322, 41 S. E., 216; 29 Cyc., 474.

We shall in this opinion deal more particularly with the error assigned on the ruling that there was lia-

bility on the part of the defendant manager, and with contentions incident thereto.

Is Smith, as a superior employee, intermediate the underhand whose negligence is relied on for recovery and the company, liable to respond therefor to a third person injured who was rightfully at the place of injury?

In *Stone* v. *Cartwright,* 6 Term Rep. (Durnf. & E.), 411, in the Court of King's Bench (1795) the action was brought by the owners of the surface, a coal mine underneath which was owned by one Ward, in which defendant Cartwright worked as manager, and as such hired and dismissed miners at his pleasure; but Cartwright had no personal interest in the business, and was not present when the injury complained of was done, nor had he given any particular orders for working the mine in the manner which had occasioned plaintiffs' damage. It was averred that Cartwright had worked the underlying mine unskillfully, and had neglected to leave necessary and sufficient supports under plaintiffs' buildings. Lord Kenyon, C. J., said: "There is no pretense whatever for imputing liability to the defendant in this action. . . . I have ever understood that the action must either be brought against the hand committing the injury, or against the owner for whom the act was done; but it was never heard of that a servant who hires laborers for his master was answerable for all their acts. The present defendant has no interest in the colliery, nor was it worked for his benefit." Lawrence, J., concurring (as did all the

judges), said: "If the plaintiffs had given evidence that the defendant had particularly ordered those acts to be done from which the damage had ensued, that would have varied the case."

The leading case in this country ruling the point is *Brown* v. *Lent*, 20 Vt., 529. It there appeared that Barker was a contractor in the construction of a railroad. Defendant was his superintendent of all work, and under defendant was one Morris, who had more immediate charge of a blasting operation, general directions in respect of which were issued by defendant. Morris gave directions to his crew relative to the particular blast complained of; defendant not being present, and giving no immediate attention thereto. The court, holding nonliability, wrote: "Barker, the contractor, in whose service the defendant was employed, as well as all other persons engaged about the ledge, may be, perhaps, responsible, as the ultimate master, the first originator and mover of all operations there, and so may Morris, and those immediately under his control, by reason of their direct participation in the injurious act; but neither principle nor authority will warrant the holding a mere middleman, an intermediate agent between the master and the direct agent, constructively responsible for the acts of the latter."

In the case of *Bileu* v. *Paisley*, 18 Ore., 47, 21 Pac., 934, 4 L. R. A., 840, it was said: "The . . . question as to whether the manager of sheep who is not the owner of them is responsible to a third party for any

acts of the herders which are done without his knowledge or authority, and contrary to his direction, depends upon his relations with the owner in regard to the matter. If the manager in such a case were a mere employee of the owner, having only a general supervision over the sheep, the immediate care of which was intrusted to another employee of the owner, then he would not be liable for the acts of the latter, unless done by his direction [citing and quoting *Brown* v. *Lent*, supra.]''

In the recent case of *Thurman* v. *Pittsburg, etc., Copper Co.*, 41 Mont., 141, 108 Pac. 588, the mining company and its foreman were joined as defendants in an action based upon alleged negligence in that an outgoing shift of miners had failed to timber the mine, and defendants had failed to require such timbering to be done. With reference to the connection of the foreman with the accident complained of, the court said: ''He was not present at the time. The shift boss was not in his employ, but in that of the company. No negligence of which the shift boss may have been guilty is properly imputable to him, for he was merely an intermediate agent who could not be held responsible except for the omission of some duty with which he himself was personally charged.''

To the same effect is the case of *Ellis* v. *Southern Railway Co.*, 72 S. C., 465, 52 S. E., 228, 2 L. R. A. (N. S.), 378.

We believe that the above are all, or quite all of the American cases that relate to the subject and they

are in accord. Mr. Labatt comments on the paucity of such authorities, but states that "the sound rule may be said to be that the superior servant or middleman is not answerable, unless he had some direct control or participation in the wrong complained of." 7 Labatt, Master & Serv. (2 Ed.), sec. 2592; and see Cooley on Torts (2 Ed.), 729.

The liability to respond rested primarily upon the underhand, Beck, as the immediate actor at fault, and even the employer company's liability was secondary, and derivative from that primary source under the doctrine of *respondeat superior*. In the process of derivation, the liability did not attach to or rest on an intermediate superior employee, but went back to the employer company, which alone may be said to have had the attitude of privy or *quasi* privy to the immediate actor.

Such intermediate superior employee is to be held to respond only if his personal negligence, in an immediate act or command, was the efficient cause or a coefficient cause of the injury. He is not to be held along with the employer to constructive liability.

Any other rule would render the responsibility of a manager, superintendent, or boss so onerous that few men could be prevailed on to assume the rank; the less fit and irresponsible would find their best opportunity, under such rule, to rise from the lower grade of employment to the higher. The sound policy of the law, as well as principle and precedent, therefore, looks, toward the adoption of the rule of nonliability.

It is to be noted that no attempt is made by plaintiff to show that Manager Smith was negligent in the selection of Beck for the post held by the latter, or that Beck was incompetent. We have not, therefore, for determination how far negligence of Smith in employing an incompetent subordinate could constitute personal negligence on his part so far pivotal or proximate in causing the injury as to render him liable to a third party. *Railroad* v. *Blair*, 1 Tenn. Ch., 351; *s. c.*, 4 Baxt. 407.

It is further contended in behalf of the appellant company that a reversal of the cause as to Manager Smith must operate to reverse as to the company as well; the argument being that the judgment against both defendants in the lower court was an entirety, and must be so treated here.

"A judgment may be correct in all respects as to one party, and altogether erroneous or void as to another joint party, . . . and in such case there is no sufficient reason why the party rightfully charged should be discharged merely on the ground that the other party was wrongfully made liable by the same judgment." *Bentley* v. *Hurxthal*, 3 Head, 378. And the principle was applied to actions based on tortious acts in *Street Railway* v. *Gore*, 106 Tenn., 390, 61 S. W., 777.

The technical rule of the common law invoked on the point is now quite generally held to be too artificial, and the trend of modern authority is towards the rule,

as declared in this State, that reversal as to a party wrongfully adjudged liable does not require a reversal as to the party properly subjected to liability. *Sparrow* v. *Bromage,* 83 Conn., 27, 74 Atl., 1070, 27 L. R. A. (N. S.), 209, 19 Ann. Cas., 796, and notes. The modern rule is obviously just, and is founded on common sense.

There is no conflict between the rule herein declared and the holding of this court in the recent case of *Loveman* v. *Bayless,* 128 Tenn. —, 160 S. W. 841. In that case the judgment against the employer was held to be erroneous because the actor or employee, whose act was the one complained of, was adjudged not liable in the lower court. There was therefore lacking a basis for a derivative or constructive liability on the part of the employer.

The court of civil appeals in affirming the ruling of the lower court was in error. Writ of *certiorari* is granted, and the judgment against defendant Smith reversed; judgment here of affirmance as to the defendant company. Costs of appeal will be paid, one-third by the appellee, and two-thirds by the appellant company.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1913.

SIVLEY *v.* NIXON MINING DRILL CO.*

(*Knoxville*, September Term, 1913.)

1. **MASTER AND SERVANT. Assumption of risk. Simple tools. Ladder.**

An ordinary ladder falls within the class of simple tools for defects in which the employer is held not liable, on the ground that such defect must be obvious to the user, by whom any risk of danger therefrom is assumed; and the equipment of the ladder with metal spikes at the bottom does not take it out of such rule. (*Post*, *pp.* 677-680.)

Cases cited and approved: Cahill v. Hilton, 106 N. Y., 512; Marsh v. Chickering, 101 N. Y., 396; Blundell v. Elevator Mfg. Co., 189 Mo., 552; Jenney Electric, etc., Railroad Co. v. Murphy, 115 Ind., 566; Meador v. Lake Shore, etc., Railroad Co., 138 Ind., 290; McDonald v. Lovell, 196 Mass., 583; Sheridan v. Gorham Mfg. Co., 28 R. I. 256.

*This case was decided Nov. 15, 1913, but owing to delay in filing opinion it is not printed in its regular order herein of cases decided at the September term, 1913, at Knoxville for the eastern division.—REPORTER.

Cases cited and disapproved: Ritt v. Tag Paint Co., 108 Tenn., 646; Jones v. Pacific Mills, 176 Mass., 354.

Case cited and distinguished: Deesecker v. Phoenix Mills Co., 98 Minn., 439.

2. MASTER AND SERVANT: Master's liability: Tools and appliances.

Where plaintiff, engaged in oiling overhead shafts and pulleys, before ascending a ladder, the lower end of which was equipped with metal spikes to prevent sliding, but which had worn blunt and become defective, requested his foreman to have some one hold it, but was told to go ahead and use it, that it had been used for three years and had never fallen, there was no order predicated upon such a condition of the ladder, or upon any inspection, upon which plaintiff could have relied. (*Post*, *pp*, 680, 681.)

Cases cited and approved: Meador v. Lake Shore, etc., R. Co., supra; Marsh v. Chickering, supra; Jenney Electric Light Co. v. Murphy, supra; Brewer v. Tennessee Coal Co., 97 Tenn., 615; Brouseau v. Kellogg, etc., Co., 158 Mich., 312.

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County to the Court of Civil Appeals and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—N. L. Bachman, Judge.

H. J. Denton, for plaintiff.

Pritchard, Allison & Lynch, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This suit was brought by Harry Sivley to recover damages for personal injuries, and is based upon alleged negligence of the employer company in furnishing him for use, in reaching to oil the overhead shafts and pulleys in the company's plant, a ladder about eighteen feet in length, the lower end of which ladder was equipped with metal spikes or brads (fixed in the upright posts to prevent the ladder from sliding) which had worn blunt and become defective.

The proof shows that plaintiff was at the time of the accident, caused by the ladder slipping from its footing on an oily floor, between nineteen and twenty years of age, and that he had been engaged in the particular service from six to eight weeks, making use of this ladder to reach the shafting about twice a week. He testifies that he had not been notified as to and did not know the condition of the spikes; that he had had previous experience in factory work, and in the use of ladders, but not around shafts.

The trial judge, on motion of the company, directed a verdict in favor of the company. On appeal the court of civil appeals held this to be error, reversing the cause, and the defendant has brought the case here for review on writ of *certiorari*.

It has been ruled by courts, quite without exception, that an ordinary ladder falls within the class of simple tools in respect of a defect in which the employer is

held not liable, on the ground that a defect in such a simple tool must be obvious to its user, by whom any risk of danger therefrom must be held to be assumed. *Cahill* v. *Hilton,* 106 N. Y., 512, 13 N. E., 399; *Marsh* v. *Chickering,* 101 N. Y., 396, 5 N. E., 56; *Blundell* v. *Elevator Mfg. Co.,* 189 Mo., 552, 88 S. W., 103; *Jenney Electric, etc., Railroad Co.* v. *Murphy,* 115 Ind., 566, 18 N. E., 30; *Meador* v. *Lake Shore, etc., Railroad Co.,* 138 Ind., 290, 37 N. E., 721, 46 Am. St. Rep., 384; *McDonald* v. *Lovell,* 196 Mass., 583, 82 N. E., 955; Labatt, Master and Servant (2d Ed.), sec. 924 (a).

The plaintiff's insistence is, however, that the fact that the ladder in this case had been equipped with metal brads or spikes at the bottom takes it out of the operation of the rule applicable to simple tools.

In *Dessecker* v. *Phoenix Mills Co.,* 98 Minn., 439, 108 N. W., 516, the facts were that a ladder had been equipped with iron brads at the bottom, one of which had in some way become detached; and when the ladder was placed by an employee on an oily floor it slipped, causing plaintiff to fall. The court said: "A ladder of the character of this one is not a complicated instrumentality, nor were there any latent defects in the construction of the one in question. It is a simple appliance, to which the rule requiring the master to inspect for the purposes of discovering possible defects caused by its use does not ordinarily apply. . . . The least effort on his [employee's] part would have disclosed the defect and we conclude that, on the evi-

dence presented, the question whether defendant was chargeable with negligence was one of law for the trial court, and that it properly resolved it in favor of defendant."

Another phase (and the one here appearing) was presented in *Sheridan* v. *Gorham Mfg. Co.*, 28 R. I., 256, 66 Atl., 576, 13 L. R. A. (N. S.), 687. A ladder was equipped with brads at its lower end, which brads had become dull and smooth, so that the ladder, when in use, was likely to slip on the floor. While plaintiff was standing on one of its rounds, the ladder slipped, and caused plaintiff to fall to the floor. It was held that the employee was chargeable, equally with the employer, with knowledge of the obvious imperfection of the ladder.

The court of civil appeals held that "the record tends to show that this was not an ordinary ladder. The spikes were located in the bottom of the upright pieces, and were not so obvious and patent as to be discernible by a casual observation"—and therefore refused to class the ladder as a simple tool. This ruling was in opposition to the authorities in point, and erroneous.

It is difficult to see how the brads or spikes had the effect to remove what would otherwise be a simple tool into a class with more complicated instrumentalities, and equally as difficult to distinguish between the dulling or rounding of the points of the metal brads, and a wearing, due to use, of the lower ends of wooden upright pieces of a ladder not equipped with brads. *Jenney Electric Light Co.* v. *Murphy,* supra.

The placing of the brads tended to render safer the simple instrumentality, and to hold that that act changed the rule otherwise applicable would be to discourage employers in making such provisions.

The plaintiff relies on the case of *Ritt* v. *Tag Paint Company*, 108 Tenn., 646, 652, 69 S. W., 324, 325, which dealt with a defective ladder; but the case is not in point. There it was ruled: "The plaintiff cannot be held to have been negligent, since the proof is that the ladder had been repaired, and was apparently safe." The repairs "apparently rendered the ladder safe, and this misled plaintiff," who, while on the ladder, was caused to fall by the breaking of a step or round where it had been repaired. The *Ritt Case*, when the real point in decision is regarded, is sound and in harmony with *Jones* v. *Pacific Mills*, 176 Mass., 354, 57 N. E., 663, and neither is in conflict with the Massachusetts case of *McDonald* v. *Lovell*, supra, or with what is here ruled.

It appeared in plaintiff's proof that, before he ascended the ladder, plaintiff requested his foreman to have some one hold the ladder while he went up, but was told by the foreman to go ahead and use the ladder; that it had been in use for three years and had never fallen with anyone. In several of the cases cited above the rule is further declared to be, in respect of simple tools, that, since it does not rest with the employee to say that his employer has superior knowledge, the fact that the former notified the employer of its defective condition and made use of the ladder

under order of the employer does not make a case of liability. *Meador* v. *Lake Shore, etc., R. Co.*, supra, citing *Marsh* v. *Chickering*, supra, and *Jenney Electric Light Co.* v. *Murphy*. And see *Brewer* v. *Tennessee Coal Co.*, 97 Tenn., 615, 37 S. W., 549; *Brouseau* v. *Kellogg, etc., Co.*, 158 Mich., 312, 122 N. W., 620, 27 L. R. A. (N. S.), 1052, and note.

It is not necessary for us to determine that point, since it does not appear that plaintiff, Sivley, complained or gave notice of any defect. In fact, his testimony was to the effect that he was not aware of the existence of any defect; nor, on the proof, was there any order of the superior of plaintiff, given to plaintiff, which was predicated upon such a condition of the instrumentality, or upon any inspection, given in response to the plaintiff's request, or otherwise, at the time, upon which the plaintiff could have relied.

The court of civil appeals erred in reversing the circuit court in respect of peremptory instructions. Reversed, with judgment here in accord.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1913.

FECHEIMER-KEIFER CO. *v.* BURTON.

(*Nashville,* December Term, 1913.)

FRAUDULENT CONVEYANCES. Bulk sales. Validity. Remedy of creditors of seller.

Where a retail merchant sold his stock in bulk without compliance with the Bulk Sales Act (Acts 1901, ch. 133), both parties being without actual intent to defraud, and paid over the proceeds to a part of his creditors, the sale was not absolutely void, so as to entitle an unpaid creditor to recover the value of the entire stock; but, the buyer being entitled to be subrogated to the claims of the creditors paid with its money, the plaintiff creditor could only recover the *pro rata* share of such value which was distributable to him. (*Post*, p. 684.)

Acts cited and approved: Acts 1901, ch. 133; Acts 1903, p. 92.

Code cited and construed: Civil Code 1895, sec. 2697.

Fecheimer-Keifer Co. v. Burton.

Cases cited and approved: Daly v. Drug Co., 127 Tenn., 412; Adams v. Young, 200 Mass., 588; Loos v. Wilkinson, 113 N. Y., 485; Algood v. Connell, 35 Tenn., 578; Neas v. Borches, 109 Tenn., 398; Gallus v. Elmer, 193 Mass., 106; Robinson v. Stewart, 10 N. Y., 189, 196; Kohn v. Fishback, 36 Wash., 69; Appel Mercantile Co. v. Barker, 92 Neb., 669; Guaranty, etc., Co. v. Pearlman (D. C.), 144 Fed., 550, *contra* National Gro. Co. v. Plotter, 167 Mich., 626; Chatterton v. Mason, 86 Md., 236; American Bonding Co. v. National, etc., Bank, 99 Am. St. Rep., 480, notes; Knafle v. Banking & Trust Co., 128 Tenn., ——.

Cases cited and distinguished: Sampson v. Brandon Grocery Co., 127 Ga., 454; Fitz Henry v. Munter, 33 Wash., 629.

FROM PUTNAM.

Appeal from Chancery Circuit Court of Putnam County, to the Court of Civil Appeals and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—A. H. ROBERTS, Chancellor.

B. G. ADCOCK and W. BRYANT, for complainant.

E. D. WHITE, for defendant Burton.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill was filed by complainants, wholesale merchants, to hold liable defendants Cooper & Brown as the purchasers of a stock of goods from defendant Burton, a retail merchant, in violation of the Bulk Sales Act (Acts 1901, ch. 133).

The value of the stock sold in bulk, without compliance with the statute's provisions, was $924.85, and that sum was paid in notes by the vendees, Cooper & Brown. Both parties were without intent to defraud, and fraud in fact is thus negatived.

Two of the three notes of Cooper & Brown were turned over to a brother of the vendor on the day of sale, and on realization he paid the proceeds to *bona fide* creditors of D. L. Burton. A third purchase money note executed by the vendee firm was transferred to this brother in his own right, he being a creditor of the vendor.

The chancellor and the court of civil appeals held that, as the entire sum received for the stock of goods had been expended in the payment of this indebtedness of the vendor, D. L. Burton, complainants were without remedy, although they received no part of the consideration sum.

It seems clear, since the sale was only fraudulent in law (*Daly* v. *Drug Co.*, 127 Tenn., 412, 424, 155 S. W., 167), that the purchasers are entitled to stand in the place of the creditors whose demands against their vendor were thus paid by the purchase money notes, or the proceeds thereof. Those whose purchase of property has been under such a statute denounced as constructively fraudulent, and avoided by creditors of the seller, may stand in the place of other creditors whose demands have been thus paid. This was held in *Adams* v. *Young*, 200 Mass., 588, 86 N. E., 942, a case involving a sale in violation of the Massachu-

setts Bulk Sale Act. *Loos* v. *Wilkinson,* 113 N. Y., 485, 21 N. E., 392, 4 L. R. A., 353, 10 Am. St. Rep., 495; *Alley* v. *Connell,* 3 Head, 578.

But does it follow that the purchasers may pay, or cause to be paid, one or more of the unsecured creditors of their vendor in full, and leave the other creditors of the same grade wholly unpaid, and successfully withstand a complaint by the latter?

The recoveries of all of the creditors of the seller cannot exceed, in the aggregate, the true value of the property fraudulently passed to the purchasers, and therefore converted.

May the entire purchase price be paid by the purchaser to one creditor, leaving the others remediless, where that price was the value of the stock of goods converted?

If this may be done, it would seem that a single creditor, holding a demand against the seller equal in amount to the value of the stock of goods on hand, could purchase that stock without complying with the terms of the act, or contravening its provisions. In the case of *Neas* v. *Borches,* 109 Tenn., 398, 71 S. W., 50, 97 Am. St. Rep., 851, the purchaser was a creditor of the seller, but that fact was not remarked on for differentiation to save the sale there involved, which was held to be fraudulent.

In *Sampson* v. *Brandon Grocery Co.,* 127 Ga., 454, 56 S. E., 488, 9 Ann. Cas., 331, it was said:

"The question presented by this record is whether a sale of a stock of goods in bulk by a debtor to his

creditor, in partial payment or entire extinguishment of his debt, is valid, unless the sale is made agreeably to the terms of the act approved August 17, 1903 [Acts 1903, p. 92]. . . . The salutory object would not be attained if sales by the debtor to the creditor in the extinguishment of his debt were excepted. . . .

"But it is contended that if the act of 1903 be applied to a sale of a stock of goods in bulk by a debtor to his creditor, so much of Civ. Code [1895], sec. 2697, as permits a debtor to prefer a creditor by a sale without reservation of any benefit will be impliedly repealed. It is a well-recognized canon of statutory construction that a subsequent statute will not repeal a former if the two can be reconciled. Construing the act of 1903 and section 2697 together, we may easily reach the conclusion that sales of stock in bulk by a debtor to a creditor, in extinguishment of his debt, in whole or in part, are still permissible, but that such sales are null and void unless there be compliance with the terms of the act of 1903."

The same rule as to a creditor purchaser was announced in *Gallus* v. *Elmer,* 193 Mass., 106, 78 N. E., 772, 8 Ann. Cas., 1067, and assumed in the decision of other cases cited in note, 9 Ann. Cas., 332.

Both phases of the above decision by the Georgia court are approved by us as sound, when application is made of its principles to our Bulk Sales Act and our law touching the right of an insolvent debtor to prefer a creditor. If the preference may not be made directly by way of a bulk sale to the creditor, it would

seem that the preference of one, with consequent exclusion of other, creditors, cannot be reached by indirection in the manner presented on this record.

The true theory appears to us to be that declared by the supreme court of Washington, in *Fitz Henry* v. *Munter,* 33 Wash., 629, 74 Pac., 1003, where, in speaking of a like act, it was said:

"The object of this law was to hold the goods of debtors under such circumstances as a trust fund for the benefit of all creditors, and to hold the purchaser in possession as a trustee for such creditors. This being so, the cause will have to be reversed, with instruction to distribute the funds pro rata to all of the creditors who are parties to the suit."

See, also, *Kohn* v. *Fishback,* 36 Wash., 69, 78 Pac., 199, 104 Am. St. Rep., 941; *Appel Mercantile Co.* v. *Barker,* 92 Neb., 669, 675, 138 N. W., 1133; *Guaranty, etc., Co.* v. *Pearlman* (D. C.), 144 Fed., 550. But see, seemingly *contra, National Grocer Co.* v. *Plotler,* 167 Mich., 626, 133 N. W., 493.

In *Gallus* v. *Elmer,* supra, the Massachusetts court said, in reference to such a statute, that it was its purpose to prevent alienation by a merchant of his stock of goods "away from his creditors *in general.*" A prime purpose of the statute was to prevent preferences of creditors by and through bulk sales.

Any other view and ruling would render the act the easy instrument of inequality and injustice, if not of frauds differing only in kind from those it was meant to prevent.

The rule of distribution *pari passu* to creditors of the grantor has been applied, and justly, in cases involving subrogation, where the conveyance was fraudulent under test of common law principles, and where no lien had been fixed by one or more of them. *Robinson* v. *Stewart*, 10 N. Y., 189, 196; *Chatterton* v. *Mason*, 86 Md., 236, 37 Atl., 960.

Since subrogation is a remedy invented by courts of equity, they will move to administer it where the result will be an equitable one, but not to work injustice to another in the defeat of an equal equity. *American Bonding Co.* v. *National, etc., Bank*, 99 Am. St. Rep., 480, notes; *Knaffle* v. *Banking & Trust Co.*, 128 Tenn. —, 159 S. W., 838.

The right of the defendant purchasers, in this case in equity, therefore, was to be subrogated to the rights of the creditors, paid by the proceeds of sale, to a *pro rata* share of the value of the stock of goods.

Complainants' rights are, by parity of reasoning, not to a recovery in full, as contended by them, but to a recovery from appellee firm of the *pro rata* distributable to them.

Writ of *certiorari* granted complainants; reversed, with remand for further proceedings not inconsistent with what is herein ruled.

WILLIAMS *v.* HEWITT *et ux.*

(*Nashville.* December Term, 1913.)

ADVERSE POSSESSION. Adverse holding. Inclosure by mistake.

Where a purchaser of land accidentally or by mistake incloses a strip contiguous to his purchase, believing he is placing the fence on the boundary, and holds the strip so inclosed for seven years, his possession is adverse, and will avail against the true owner. (*Post*, *pp.* 690, 691, 692.)

Cases cited and approved: Erck v. Church, 87 Tenn., 575; Kirkman v. Brown, 93 Tenn., 476; Brock v. Burchett, 32 Tenn., 27; Gates v. Butler, 22 Tenn., 447; Coal Creek Mining Co. v. Ross, 80 Tenn., 1; McSpadden v. Iron Co., 42 S. W., 497; Coal Co. v. Ferguson, 35 S. W., 900; Callaway v. Sandford, 35 S. W., 776; Coal Co. v. Lawson, 35 S. W., 456.

FROM DAVIDSON.

Appeal from Chancery Court, Davidson County.—JOHN ALLISON, Chancellor.

THOS. H. MALONE, for appellant.

E. J. SMITH, CHERRY & STEGER, and H. S. STOKES, for appellees.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

This is ejectment, and the facts appear by stipulation of counsel as follows:

The land in controversy is a narrow strip, fronting about two feet on the north margin of Broad street, and measuring about four feet on an alley in the rear, and running back 160 feet and six inches on the east side, and somewhat less distance on the west side.

P. L. Nichol owned the whole of lot No. 61, of which the land in controversy is a part. Nichol sold to Michael Halloran the eastern half of lot No. 61 in June, 1864. Halloran understood that he bought and paid for a fifty-foot lot, which was exactly one-half of original lot No. 61; but when he inclosed it by fence, by accident, he laid off his fence so as to include a frontage of about fifty-two feet on Broad street, and about fifty-four feet on the alley in the rear. He held the land as inclosed for more than twenty years before this bill was filed, under fence, with a residence on a portion of the lot; but he did not know that he had more than fifty feet under fence until the year 1910, and he never intended to claim more than fifty feet. The strip in controversy formed a part of Halloran's yard. In December, 1899, Halloran conveyed to his two daughters the eastern half of lot No. 61, fronting fifty feet on the north side of Broad street. They took possession of the tract as inclosed by Halloran, and held it until October, 1906. October 23, 1906, they conveyed to the defendants the eastern half of lot 61, fronting fifty feet on the north side of Broad street. Defendants took possession of the whole tract under fence, and have since occupied the said entire tract. After Nichol sold the eastern half of lot 61 to Halloran, he

sold the western half of said lot, fronting fifty feet on Broad street, to Mary G. McLean, in July, 1864. This western half has come down to the complainant by a regular chain of conveyances, and each deed describes it as fronting fifty feet on Broad street. After the complainant purchased the lot in October, 1910, a survey of the premises was made, and it was then discovered for the first time that defendants had under fence about fifty-two feet front as hereinbefore stated.

It is perceived that the question involved is whether the mistaken or accidental inclosure of the strip in controversy by Halloran, and the subsequent holding of the same by his privies in title for more than seven years, have formed a bar to the complainant's right of action. On the authority of *Erck* v. *Church,* 87 Tenn., 575, 11 S. W., 794, 4 L. R. A., 641, we must hold that the complainant's suit is barred. It is insisted, however, for the complainant, that *Erck* v. *Church* is in conflict with the great body of the law in this state on the question of accidental possession. *Kirkman* v. *Brown,* 93 Tenn., 476, 27 S. W., 709; *Brock* v. *Burchett,* 2 Swan, 27; *Gates* v. *Butler,* 3 Humph., 447; *Coal Creek Mining Co.,* v. *Ross,* 12 Lea, 1; *McSpadden* v. *Iron Co.,* 42 S. W., 497, opinion of Court of Chancery Appeals, April, 1897; *Coal Co.* v. *Ferguson,* 35 S. W., 900, opinion of Barton, Judge, Court of Chancery Appeals, October 5, 1895; *Calloway* v. *Sanford,* 35 S. W., 776, opinion by Barton, Judge, Court of Chancery Appeals, August 31, 1895; *Coal Co.* v. *Lawson,* 35 S. W., 456.

The foregoing cases constitute probably all of our decisions upon the question involved. They are all in the same class of authority with *Gates* v. *Butler*, supra. This latter case is distinguished in *Erck* v. *Church*, although the distinction between the case at bar and the case of *Kirkman* v. *Brown* is not entirely apparent. *Erck* v. *Church* has been recognized as a ruling case upon its facts since the date of its decision. We have found no subsequent case that has commented upon it, or has questioned the distinction there taken between an accidental possession held by actual inclosure, and an accidental possession of a part of a large tract, and a claim of actual possession of the entire boundary under color of title. The other cases cited, supra, than *Erck* v. *Church*, seem to consider an accidental possession as lacking in the element or adverseness.

Without questioning the authority of *Erck* v. *Church*, we desire to reaffirm the soundness of *Kirkman* v. *Brown* and the other cases cited, and which comprise the body of the law in this State upon the effect of accidental possession. *Erck* v. *Church*, is reaffirmed, and will be followed in cases similar in their facts, in so far as it holds that an actual inclosure of lands, although taken and held by accident or mistake, if maintained for a period of more than seven years, will bar an action of ejectment under the second section of the act of 1819.

The decree of the chancellor is affirmed.

SAUNDERS *et al. v.* LANIER *et al.*

(*Nashville.* December Term, 1913.)

1. **ASSIGNMENTS FOR BENEFIT OF CREDITORS. Sale of property.**

In a special assignment in trust for creditors, a direction to sell "to the highest bidder either at public or private sale" imports a sale for cash, and, when the trustee and a preferred creditor assume to make a credit sale, they become absolutely responsible for the whole price. (*Post, pp.* 694, 695.)

2. **PRINCIPAL AND SURETY. Discharge of sureties. Loss of other securities.**

The security provided by a special assignment for creditors inured to the benefit of sureties on a note secured thereby, and, a portion thereof being lost by negligence of the payee in actively assisting to sell the the trust property, and taking in part therefor an insolvent note, or in making a credit sale at all, he, and not the sureties, must bear the loss. (*Post, pp.* 695, 696.)

Cases cited and approved: Renegar v. Thompson, 69 Tenn., 457; Allen v. Henley, 70 Tenn., 141; *In re* Cator, 82 Tenn., 408; Gillespie v. Darwin, 53 Tenn., 21; First National Bank v. Kittle, 69 W. Va., 171.

FROM DAVIDSON.

Appeal from Circuit Court, Davidson County.—THOS. E. MATHEWS, Judge.

LAURENT BROWN and ROBT. SADLER, for Saunders.

W. B. BALLARD, for Lanier.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

Robert Lanier held a note of $550 on J. T. Pitt & Co., on which B. F. Saunders and W. T. Pitt were sureties. The sureties are sued in the present case, and they claim a credit of one-half of a note of $358 executed to George J. Thompkins, trustee, under the following circumstances:

J. T. Pitt & Co., being in failing circumstances, executed a special assignment to Thompkins on a stock of goods and other personal property valued at $915.40, together with a small number of *choses* in action, the latter valued at about $200. The assignment preferred the debt of Lanier and also a debt of $398.53 of Coleman & Thompkins, a firm of which the trustee was a member. The trustee, Thompkins, by and with the active connivance of Lanier, sold the personal property, exclusive of the *choses* in action, to the firm of Sevier & Markham, and took therefor two notes of $358 each. It was agreed between Lanier and Coleman & Thompkins, acting through Thompkins, that these two notes should be divided equally, or their proceeds, between Lanier and Coleman & Thompkins. One of these notes was executed by Sevier, with Clarence Jackson as surety, and was collected and applied. The other note was executed by Markham, without surety, and proved insolvent. The trustee and Lanier had the opportunity of taking for the goods and other personal property, except the *choses* in action, one note

for $716 signed by Sevier & Markham, with Clarence Jackson as surety thereon, which would have been a perfectly solvent note; that is, they had the opportunity of adopting a contract that had been made between J. T. Pitt & Co. and Sevier & Markham to give such a note, which had been assented to by Jackson and a note was so drawn and signed. For some reason, not fully explained in the record, they declined to take this note, but took two notes in the form already explained. Perhaps it was with the view of arranging the purchase price in equal amounts for division between Lanier and Coleman & Thompkins. This latter purpose seems to have been partially executed, but finally the whole matter of collection was turned over to Thompkins. However, as stated, Lanier and Thompkins took the insolvent note of Markham, and thus squandered that much of the security which the principal debtors, J. T. Pitt & Co., had provided by the special assignment.

In what has been said we have assumed that the assignment authorized a sale on a credit; but, in fact, no such direction or permission was given to the trustee. The direction was to sell "to the highest bidder either at public or private sale." This imported a sale for cash. When the trustee and Lanier assumed to make a credit sale, they became absolutely responsible for the whole price which the property brought.

Lanier has sued the sureties on the note without allowing any credit for any part of the $358 insolvent note so taken by him and Thompkins. The sureties

insist that they are entitled to a credit for one-half of this note.

We think this contention is correct. When the special assignment was executed by the principal debtors for the benefit of the creditor, Lanier, the security thereby provided inured to the benefit of the sureties on the note. A portion of this security having been lost by the negligence of the creditor in actively assisting the trustee in making the sale of the trust property, and taking in part therefor an insolvent note, or, indeed, in making a credit sale at all, he must bear the loss, not the sureties. Under the agreement between the creditor, Lanier, and the trustee, Thompkins, acting for the latter's firm, Lanier was to have one-half of the proceeds of the sale. He would therefore be chargeable with one-half of the loss of the $358 represented by the insolvent note of that amount. A credit will therefore be entered on Lanier's note for one-half of the $358 note, and, after allowing other credits appearing on the note sued on, a judgment will be rendered in favor of Lanier for whatever balance may appear to be due.

The conclusion we have reached is fully sustained by the following authorities: Renegar v. Thompson, 1 Lea, 457; Allen v. Henley, 2 Lea, 141; In re Cator, 14 Lea, 408, 418; Gillespie v. Darwin, 6 Heisk. 21; First National Bank v. Kittle, 69 W. Va. 171, 71 S. E. 109, 37 L. R. A. (N. S.) 699, Ann. Cas. 1912D, 113, and note; 32 Cyc. 216, 217.

CALDWELL *v.* NASHVILLE INTERURBAN RAILWAY CO. *et al.*

(*Nashville.* December Term, 1913.)

INJUNCTION. Contempt.

Where a temporary injunction issued to restrain a railroad company from condemning a right of way immediately in front of complainant's residence was dismissed on stipulation, which provided that both parties should apply for a dismissal, and that the road should be constructed in a certain manner, and the trains operated at less than a certain rate of speed, the officers of the railroad company cannot be proceeded against as for contempt for violation of the injunction because they operated the trains at a greater rate of speed. (*Post*, *pp.* 698-704.)

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County to the Court of Civil Appeals and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—JOHN ALLISON, Chancellor.

WM. HUME, JR., for Caldwell.

JNO. A. PITTS, for Nashville Interurban Ry. Co.

MR. JUSTICE LANSDEN delivered the opinion of the Court.

The complainant, Caldwell, filed a petition in this case in the chancery court of Davidson county against J. H. Carpenter, president, and Meade Frierson, man-

ager of the Nashville Interurban Railroad, seeking to attach them for contempt for violating a perpetual injunction claimed to have been awarded by the final decree in the principal case. The petition was demurred to, and the chancellor overruled the demurrer, but allowed an appeal to the Court of Civil Appeals before final judgment, where his decree was affirmed. The case is before us for writs of *certiorari* to the decree of that court, and has been argued at the bar.

The facts necessary to be stated are as follows:

The Interurban Railway, a Tennessee corporation, was organized to construct and build a line of railroad from Nashville to Franklin, Tenn., and was about to enter upon the premises of the complainant, Caldwell, for the purpose of locating its line of road. In 1908 Caldwell filed the original bill in the chancery court of Davidson county against the railway, and alleged that it had filed its petition in the circuit court of Davidson county against him seeking to condemn a right of way through two certain tracts of land, title to which was in the complainant, one tract containing about 167 acres and situated four miles south of the city of Nashville. This tract is complainant's home tract, and is known as Longview. The bill stated that the defendant railway sought to condemn a strip of land through Longview 1,724 feet long and twenty feet wide, that extended in front of the residence, and between it and the Franklin turnpike, and on the inside of a handsome and expensive stone wall which Caldwell had constructed in front of his residence, between

it and the turnpike. It was charged that to so locate the right of way of the defendant would destroy the beauty of this valuable residence property and would greatly endanger the occupants of the place in going and coming from the residence. It was also charged that there were no engineering difficulties in the way of locating defendant's road on the opposite of the turnpike from the residence and improvements, but that the defendant had capriciously located its right of way next to complainant's residence and inside of the grounds, and between the stone wall and the residence, because of an agreement to so locate it which the defendant had entered into with a landowner on the opposite side of the turnpike from complainant.

It was further shown that, if it should be necessary to locate the railroad on the side of the turnpike on which complainant lived, there was no reason why the right of way for the railroad should not be on the right of way of the turnpike, and on the outside of complainant's inclosures. In addition, it was charged that the location of the railroad over and along Longview as proposed by the defendant was not in good faith, but in disregard of complainant's rights.

This bill also charged that there was no public necessity for the defendant's railroad, because the country which it was proposed to traverse by it was already adequately supplied by a line of the Louisville & Nashville Railroad Company, which extended along the line of the defendant, and practically parallel with it. And, in addition, that there was a turnpike extend-

ing along the same route which together with the line of the L. & N. R. R. Co., made adequate facilities for the traveling public.

It was prayed that a writ of injunction issue to restrain defendant from prosecuting its condemnation proceedings, and from entering upon complainant's land and locating and constructing its proposed line of road over his lands, as sought in the condemnation suit. This bill was answered, and the chancellor heard the complainant's motion for an injunction upon bill and exhibits, and the answer and its exhibits, together with an affidavit and the argument of counsel, when the chancellor granted the injunction upon full hearing. There was a demurrer to the original bill which the chancellor overruled, and granted the defendant an appeal to the Supreme Court from his action in overruling the demurrer, but, after the appeal had been prayed, but before it was perfected, the parties compromised, and settled their differences by two written agreements, which were made the decree of the court in the principal case, and it is this decree which it is claimed awarded the perpetual injunction, for violating which the defendants have been attached. The parts of the compromise agreement which made the decree of the chancery court material to this investigation are as follows:

"JAMES E. CALDWELL v. NASHVILLE INTERURBAN RAILWAY.

"This cause came on this day to be heard upon the following stipulations of the parties, namely: This agreement, made and entered into on this the 15th day of October, 1908, by and between the Nashville Interurban Railway Company, party of the first part; and James E. Caldwell, individually and as trustee for his wife and children, parties of the second part, witnesseth:

"The parties of the second part agree that the party of the first part may construct a single track electric railway in front of the premises of the second parties on the Franklin road known as Longview, in the following manner, and on the following terms:

"(1) The track is to be laid as near to the western margin of the macadamized road, and as far from the stone fence on the margin of said property as may be feasible and practicable. . . .

"(5) The rate of speed of trains and cars shall not exceed ten miles per hour in front of these premises; and all trees cut in consequence of this grant shall be cut into cordwood and belong to second parties. . . .

"It is further agreed that upon the execution of this agreement, and deposit of said sum of money [$10,000 stipulated to be deposited in a bank] the first party shall have the right to immediately, or at any time thereafter begin the necessary work to construct said railway in front of said premises,

and this agreement shall be made a decree of the chancery court of Davidson county, Tennessee, in the cause of James E. Caldwell v. Nashville Interurban Railroad Company and others, and all the parties shall join in a request to the chancellor of the chancery court to dissolve the injunction heretofore granted in this case. . . . And the conditions upon which said grants are made are to be binding perpetually.

"And upon consideration thereof, it is ordered that they [two agreements between the parties, both of which are set out] be and hereby are made the decree of the court; and

"That the complainant recover of the defendant the costs of this cause, for which execution will issue, as at law; and

"That this cause be retired from the docket with leave to reinstate the same upon application of either party as by said stipulation is provided."

The specific matter which is charged against the defendants in the petition for contempt is that they are running trains in front of the petitioner's premises in willful violation of the fifth section of the compromise agreement and decree; that is, that the trains of defendant railway are constantly running in excess of ten miles per hour in front of these premises.

In the view which we have taken of the case, it is not necessary to pursue the arguments of learned counsel, nor to review the numerous authorities cited, because we think our position can be made clear by reference to a few fundamental principles of law and

practice governing the issuance of the writ of injunction. This writ is an extraordinary one, and never issues as of course. It can only issue upon the fiat of a judge or chancellor authorized by law to award it, and only then upon compliance with certain prerequisites prescribed by the statutes. With rare exceptions, the writ can only issue upon special application and special prayer therefor. A final decree *ipso facto* dissolves a temporary injunction, and a perpetual injunction does not arise from a final decree, unless it is specially awarded.

Applying these well-settled principles to the case in hand, it will be obesrved that the parties agreed to dissolve the temporary injunction, both expressly and by implication arising out of the terms of the compromise settlement. What is meant is that the compromise settlement expressly authorizes the railroad company to do all of the things which it was inhibited from doing by the temporary injunction, and it also expressly provides "that all the parties shall join in a request to the chancellor of the chancery court to dissolve the injunction heretofore granted in this case." While it is true that the agreement provides that "the conditions upon which said grant is made are to be binding perpetually," it does not provide that the defendant is perpetually enjoined from violating the agreement, nor does it award to the complainant the extraordinary process of injunction to enforce the performance of the decree. It is argued by the defendants that the agreement does not have the pro-

bative force of a decree, because it is merely an agreement of the parties, and is not a judicial sentence, notwithstanding that it was entered upon the minutes of the court. However, this may be, we think it is true that the agreement, whether considered as such, or as the decree of the court does not purport to do more than to fix the rights of the parties. For this purpose it is binding upon all who consented to it. But as stated, it does not assume to provide a remedy for its enforcement, and much less the extraordinary remedy of injunction. We express no opinion upon the question of whether the parties could agree to enforce their contracts by the writ of injunction without the express approval and adjudication of the chancellor. The complainant's remedy to enforce the agreement may be by injunction, but, before the defendants can be punished for contempt of this extraordinary writ, the writ itself must be specially awarded.

The demurrer is sustained, and the petition is dismissed.

LUSKY *v.* KEISER.

(*Nashville.* December Term, 1913.)

1. **FRAUDS, STATUTE OF. Sale of real estate. "Party to be charged."**

The words "party to be charged," as used in the statute of frauds requiring a memorandum of a sale of real property signed by the party to be charged, means the owner of the realty rather than the party attempted to be charged or held liable in an action based on the memorandum. (*Post, pp.* 708, 709.)

Cases cited and approved: Frazer v. Ford, 39 Tenn., 464; Lee v. Cherry, 85 Tenn., 707.

2. **FRAUDS, STATUTE OF. Sale of real property. Necessity of written contract.**

It is not necessary that a contract for the sale of real property be in writing, provided there is a writing which contains evidence of the essential terms of the oral contract, and which is signed by the party to be charged. (*Post, p.* 709.)

3. **FRAUDS, STATUTE OF. Sale of land. Written memorandum.**

A written offer to purchase land when signed and accepted may constitute a memorandum of the contract sufficient to satisfy the statute of frauds, though it consist of several contracts. (*Post, p.* 709.)

Cases cited and approved: Lee v. Cherry, supra; Otis v. Payne, 86 Tenn., 666.

4. **FRAUDS, STATUTE OF. Selling of land. Written memorandum.**

Complainants executed to a broker a contract authorizing the latter to sell a tract of land belonging to one of them, the instrument containing a description of the land, the price and terms, and an agreement to make a deed to any good purchaser complying with the terms procured by the broker. The broker thereafter obtained defendant's consent to purchase, 128 Tenn. 45

and induced her to sign an addenda on such contract reciting that she accepted the proposition. *Held*, that such contract was merely to define the relation between complainants and the broker, and that it did not constitute a sufficient memorandum of the contract between complainants and defendant to bind her to purchase under the statute of frauds. (*Post*, *pp.* 709-716.)

Cases cited and approved: Lee v. Cherry, supra; Grafton v. Cummings, 99 U. S., 100; Lewis v. Wood, 153 Mass., 321; Weatherhead v. Ettinger, 78 Ohio St., 104; Jordan v. Mahoney, 109 Va., 133; Donnell v. Currie (Tex. Civ. App.), 131 S. W., 88; Evans v. Stratton, 142 Ky., 615; Davis v. Brigham, 56 Ore., 41.

Cases cited and distinguished: Haydock v. Stow, 40 N. Y., 363; Fletcher v. Underwood, 240 Ill., 554; Ullsperger v. Meyer, 217 Ill., 262; Lasher v. Gardner, 124 Ill., 441.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. —Jno. Allison, Chancellor.

Lewis Leftwich, for appellants.

G. B. Kirkpatrick, A. F. Whitman, and Jno. E. Fisher, for appellee.

Mr. Justice Williams delivered the opinion of the Court.

Complainants, husband and wife, executed to one Loventhal, a real estate agent, a contract authorizing the latter to sell a tract of land belonging to the wife.

Acting under that contract, Loventhal opened negotiations with defendant, Keiser, who agreed to purchase The instrument executed to the real estate agent by complainants, so far as pertinent, is quoted, as follows:

"We, Louis Lusky and Lettie Lusky, hereby authorize and empower Dorris S. Loventhal, a real estate dealer in Nashville, Tennessee, to sell for us our farm, containing 106 acres, more or less in the 12th civil district of Davidson county, Tennessee (here giving boundaries) at and for the sum of $11,000, payable $4,500 in cash, and an assumption of a mortgage thereon for $3,500. . . . And we agree to make a deed to any good purchaser, complying with said terms, procured by said Loventhal, with the usual covenants of warranty and seisin.

"This February 16, 1912.

"LETTIE LUSKY,

"LOUIS LUSKY."

Defendant's acceptance was appended:

"February 17, 1912. I hereby accept the proposition.

"AMELIA KEISER."

The bill of complaint recites that, in order to carry out the contract in good faith, the complainants on March 14, 1912, notwithstanding the refusal of defendant to abide by and perform her contract, executed a deed in accordance with the above-quoted instrument, and tendered same, but that its acceptance

and contract performance were declined by defendant, who gave no reason or excuse therefor. Suit was brought to recover the difference between the contract price claimed to be thus fixed and the market price as determined by a fully advertised auction sale of the land made in May, 1912, to wit, $3,400.

Defendant, Keiser, interposed a demurrer to the bill of complaint on the grounds: (1) That no contract binding on her was entered into; and (2) the instrument relied upon as an agreement falls within, and fails because of, the statute of frauds. The chancellor sustained both of these grounds of demurrer, and from that decree an appeal was prayed to this court.

It is urged in argument in behalf of complainants and appellants that the instrument signed and delivered to the real estate agent by them was a memorandum sufficiently binding them as the "party to be charged" under our statute of frauds, when defendant's acceptance was indorsed.

Our statute, as to this phrase, has been construed by this court to mean the owner of the realty rather than the party attempted to be charged or held liable in an action based on the memorandum. *Frazer* v. *Ford,* 2 Head, 464; *Lee* v. *Cherry,* 85 Tenn., 707, 4 S. W., 835, 4 Am. St. Rep., 800.

It is by the defendant insisted that the instrument so signed and delivered was not one with her as a contracting party, and operated only as between and on the rights and liability of the owners signing and the real estate agent; that it, was, in no proper sense, a

memorandum or contract of sale contemplated by the statute.

Thus is raised a sharp issue as to the nature and sufficiency of the instrument thus signed by the owners.

It is not necessary that the contract of sale shall be in writing, provided there outstands a writing which contains evidence of the essential terms of the oral contract, and which is signed by such party to be charged. The memorandum is not the contract, but the written evidence of it required by the statute.

A written offer when signed and accepted may constitute a memorandum of the contract, adequate, though it consist of several parts, such as letters relating to the subject, and even though they may be addressed to the owner's agent. *Lee* v. *Cherry,* supra; *Otis* v. *Payne,* 86 Tenn., 666, 8 S. W., 848; 20 Cyc., 254, 255.

It is thereupon argued that here there is such an offer shown addressed to the agent of the owners. But does the instrument tend to evidence, what it must do, a contract of sale between complainants as offerers and defendant as offeree? The defendant was not mentioned in the instrument, when signed, as offeree or buyer, as seems requisite. *Lee* v. *Cherry,* supra; *Grafton* v. *Cummings,* 99 U. S., 100, 25 L. Ed., 366; *Lewis* v. *Wood,* 153 Mass., 321, 26 N. E., 862, 11 L. R. A., 143; 20 Cyc. 261.

In the case of *Haydock* v. *Stow,* 40 N. Y., 363, it appeared that an instrument was executed and delivered

to a firm of real estate agents by the owner, as follows:

"I hereby authorize and empower Peck, Hillman & Parks, agents for me, to sell the following property (describing it) to be sold within —— days from this date, on the following terms (giving them), with interest semiannually, if desired by the purchaser; reserving the right to withdraw the property at any time before the sale, by giving Peck, Hillman & Parks notice thereof.

"Troy, February 18, 1864.

"F. A. Stow."

Indorsed thereon was, "I hereby agree to purchase the property herein mentioned upon the terms expressed," signed by plaintiff, who brought suit to enforce the contract, as one properly evidenced by the above as the memorandum, after Stow had served notice declaring null the instrument thus signed by him. The situation of the parties was the reverse of what appears in the pending case, but the question in each was and is as to the sufficiency of the claimed memorandum. The court of appeals, through Hunt, J., said of the instrument: "It is variously styled an agreement to sell, an offer or proposition of sale, and a power of attorney. It is not an agreement to sell, for the reason that there are not two parties to it. An agreement cannot be made by one party alone. There is no pretense that Peck and Hillman agreed to buy, or that the defendant agreed to sell to them, and they are the only parties named in the paper, ex-

cept the defendant himself. Nor do I see any ground upon which it can be called an offer of sale, except so far as the appointment of an attorney to sell may include such offer. I agree that if the defendant had addressed plaintiff a letter offering to sell him these premises upon the terms specified herein, and plaintiff had made a written acceptance of the same, addressed and delivered to the defendant, that a contract of sale would have been thereby created. . . . But that is not the present state of facts. I consider the instrument to be a plain, direct, unqualified power of attorney to sell the land mentioned in it; nothing more, nothing less. I do not discover in it a single expression that embarrasses such a conclusion. . . . In law, "this reservation" to withdraw the right to sell "was unnecessary," as "the right belonged to the defendant . . . without the formal reservation. . . . This is neither an agreement for sale nor an offer to sell to any particular person, or to the world at large. It is simply a vesting in Peck & Co. of a power before existing in the defendant only. . . . A giving of power and authority, in law creates an agency; but the defendant and Peck & Co. were not content with the declaration of law to that effect, but take the pains to allege that, in fact, Peck & Co. are the agents of the defendant to sell his property. They stand then as agents empowered to sell, . . . and, if they had made such a contract with plaintiff, the defendant would have been bound by it. No such agreement or subscription was made. Plaintiff has,

indeed, expressed in writing his readiness to purchase upon the terms that Peck & Co. were authorized to accept, but Peck & Co. have put nothing in writing. This is not a compliance with the statute, which requires the writing 'to be subscribed by the party by whom the sale was made, or by the agent of such party lawfully authorized.' The defendant or his agent must sign, to make a compliance with the statute, and no aid is derived from the signature of plaintiff."

In *Fletcher* v. *Underwood,* 240 Ill., 554, 88 N. E., 1030, a similar contract was executed by the owner to a real estate agent, under which the agent had attempted to close orally a trade to Fletcher, who, claiming to be vendee, as appellee on appeal, urged that the instrument referred to was in the nature of an accepted option. The court said: "Appellee contends that 'an inspection of the written option signed by Carney [owner] shows that it was an offer to sell the one-fourth interest for $2,000, to be accepted by the end of the 27th of January, 1908,' and relies upon *Ullsperger* v. *Meyer,* 217 Ill., 262 [75 N. E., 482, 2 L. R. A. (N. S.), 221, 3 Ann. Cas., 1032.], and other cases of that character, in which specific performance had been decreed in favor of a vendee against a vendor where the latter had signed the contract or memorandum, and the former had not. In each of those cases the identity of both vendor and vendee could be ascertained from the writing. Here no vendee is named or otherwise pointed out by the writing. It is true the

instrument states that Carney will, upon demand, within the time limited, make a good and sufficient transfer of the interest to which the contract pertains; but to whom? Manifestly, to the person to whom Parriott [the agent] should made a sale. The fact that Parriott had made a sale, the statute of frauds being interposed, could be evidenced, as against Carney, only by a writing signed by Parrott, acting as agent for Carney.''

It may be said, by way of parenthesis, that we need not express an opinion in regard to the soundness of those parts of the decisions in the cases of *Haydock* v. *Stow* and *Fletcher* v. *Underwood,* supra, in reference to the power of the agents, under such contract executed to them, to conclude or make contracts of sale binding on their principals, the owners. While a ruling on the point is not necessary, it may be noted that the question is comprehensively treated in an annotation of the case of *Weatherhead* v. *Ettinger,* 78 Ohio St., 104, 84 N. E., 598, in 17 L. R. A. (N. S.), 210, where the rule, by a clear weight of authority cited, is indicated to be that no wider power is to be deduced from such an authorization to sell than one of finding for the owner a purchaser ready, willing, and able to purchase.

We think it clear that the instrument executed by the owners, Lusky and wife, was one whose function and end was to define in contract form the relationship between them and their agent, Loventhal; and it is difficult to see how, without a further step by or in

behalf of the owners towards contractual assent with defendant, Keiser, that instrument, so perfected as a contract proper, may be deemed a memorandum evidencing another and different contract between the owners and defendant, Keiser—a contract of sale. There was no existent oral contract between the latter parties on February 16, 1912, which could have been evidenced by the contract of agency.

The case of *Lasher* v. *Gardner*, 124 Ill., 441, 449, 16 N. E., 912, is pertinent on its facts and in this language: "It is not contended that the letter of attorney to Van Zandt was a contract entered into with Lasher (claimant to *status* of vendee), but it is said that it is a memorandum of the contract signed by the parties to be charged. . . . The writing, on its face, does not purport to relate to a past transaction, and, in fact, as we have seen, there was no contract made, at the time of its execution, of which it could have been a memorandum." In accord is *Jordan* v. *Mahoney*, 109 Va., 133, 135, 63 S. E., 467, 17 Ann. Cas., 267.

In *Donnell* v. *Currie* (Tex. Civ. App.), 131 S. W., 88, it was held that letters from the owner of land to his selling agent, referring to the price and terms upon which it might be sold, were mere instructions for the agent's guidance, and not an offer of sale to a prospective purchaser procured by the agent; the letter not having been intended as contract of sale.

The most specious argument in behalf of the appellants' contention is that the agency contract was an

offer through the agent to the purchasing public, and binding upon acceptance by any one able to comply. This is refuted when consideration is given to the nature of the contract, which is not addressed to the world at large, or to any prospective acceptor whomsoever, as is the case in open offers of rewards, of prizes, or of letters of credit addressed generally.

In *Lee* v. *Cherry,* supra, it may be observed, a correspondence by letters between the owner and his agent was made to serve as an adequate memorandum, but the owner therein authorized the sale of the lot to Lee. In short, the letters "contained all the terms of sale and a sufficient description of the property," including the name of the prospective vendee, to whom the owner specifically obligated himself.

A contract similar to the one in this case, between owner and agent, appeared in *Evans* v. *Stratton,* 142 Ky., 615, 134 S. W., 1154, 34 L. R. A. (N. S.), 393; but the question now under consideration seems not to have been there raised. The court, in that attitude of the cause, appears to have assumed that the agency contract as a memorandum was sufficient, or became a contract on acceptance, without deciding the point as we conceive. See, in this connection, *Davis* v. *Brigham,* 56 Or., 41, 107 Pac., 961, Ann. Cas. 1912B, 1340.

On these authorities, and on principle, we conclude that the contract between the complainants and their real estate agent cannot be made to serve as a memorandum which adequately evidenced the essentials of a contract for the sale of realty between the complain-

ants and the defendant. The complainants, unless and until they came more immediately into contractual relation to defendant, were at liberty to decline to proceed. If this be true, the defendant was not bound to do so. Her signature was not, as we have seen, that of "the party to be charged," and it did not avail to consummate a contract binding on her, where none existed before.

There is no error in the decree of the chancellor. Affirmed.

Reeves *v.* Haynie.

(*Nashville.* December Term, 1913.)

COURTS. Appellate jurisdiction. Ejectment.

Where a bill charged that complainant was the owner of land and entitled to its possession, and that defendant entered thereon and was claiming it under a pretended title, appropriating rents and profits, and prayed for adjudication of the title and for possession and rents, and the answer admitted possession, but denied complainant's title and right of possession, and set up defendant's own claim of title, and an amended bill reiterated complainant's claim, and attacked defendant's claim and sought to remove it as a cloud, the original bill made a case of ejectment of which the court of civil appeals has no jurisdiction under acts 1907, ch. 82, sec. 7; the relief sought in the amended bill being merely incidental thereto, and not devolving jurisdiction on that court. (*Post, pp.* 718, 719.)

Acts cited and construed: Acts 1907, ch. 82, sec. 7.

Case cited and disapproved: Murphy v. Sullivan, 124 Tenn., 430.

FROM JACKSON.

Appeal from Chancery Court, Jackson County.—A. H. Roberts, Chancellor.

W. W. Draper, for complainant.

D. B. Johnson, for defendant.

Mr. Chief Justice Neil delivered the opinion of the Court.

This case was appealed from the chancery court of Jackson county to the court of civil appeals, and was

by that court removed to this court on the ground that the controversy was one in ejectment. The question is whether the case was properly removed.

The bill charged that the complainant was the owner of the land in controversy, and, as such, was entitled to its possession; that defendant had entered upon this land, and was claiming it under some sort of pretended title, and was appropriating the rents and profits. The prayer was for an adjudication of complainant's title, and that he recover possession of the land, together with the rents.

The defendant answered, admitting possession and denying complainant's title and right of possession, and setting up his own claim of title. Thereupon an amended bill was filed in which the complainant reiterated his claim of title and his right of possession, and attacked defendant's claim and sought to have it removed as a cloud.

The original bill made a clear case of ejectment, over which the court of civil appeals had no jurisdiction under Acts 1907, ch. 82, sec. 7. The fact that the amended bill sought to remove defendant's claim of title as a cloud would not devolve upon the court of civil appeals jurisdiction of the case. The relief sought in the amended bill was merely incidental to the ejectment suit.

We are of the opinion, therefore, that the case was properly removed.

The case is not at all like that of *Murphy* v. *Sullivan,* 124 Tenn., 430, 136 S. W., 996.

On the merits of the controversy we think the chancellor reached the correct conclusion, and his decree is affirmed, with the costs of this court. The costs of the court below will be paid as decreed by the chancellor.

GRAHAM *v.* WILLIAMSON.

(*Nashville.* December Term, 1913.)

1. **CONTEMPT. Nature of proceeding.**

A contempt proceeding is both civil and criminal in its nature in that proceedings to ascertain existence of a contempt may be purely civil in the court wherein it arises, but that it is an offense against public justice, and may be proceeded against also by indictment or presentment, and in either case the punishment either by fine or imprisonment is criminal. (*Post*, *p.* 722.)

2. **CONTEMPT. Jurisdiction of proceedings.**

The dual nature of a contempt proceeding as both civil and criminal does not prevent its prosecution in any court wherein a contempt occurs, though it be a court of purely civil jurisdiction. (*Post*, *p.* 723.)

3. **CONTEMPT. Power to punish.**

The power to punish for contempt is inherent in all courts to enable them to accomplish the purposes for which they were designed, and, while it may be regulated by the legislature, it is not conferred. (*Post*, *p.* 723.)

4. **CONTEMPT. Appellate jurisdiction.**

Contempt proceedings for failure to obey a preliminary injunction are merely an incident to the power of the chancery court in the main controversy, and hence jurisdiction on appeal from the decision in that controversy controls such jurisdiction in the contempt proceedings, and hence, where the main controversy, under Acts 1907, ch. 82, belongs to the court of civil appeals, the contempt proceeding likewise belongs to it. (*Post*, *pp.* 723, 724.)

Acts cited and construed: Acts 1907, ch. 82.

FROM MAURY.

Appeal from Chancery Court, Maury County.—J. P. ABERNATHY, Chancellor.

PEEBLES & FORGEY and J. T. WILLIAMSON, for appellant.

HOLDING & GARNER, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

It appears from the original bill in this case that a certain road in Maury county was ordered closed, as a public road, by the county authorities, and thereupon the defendant Williamson, an abutter on the south side, proceeded, on his own account, to place a fence across it; that complainant's land abuts on this road, and he has a private easement of way, regardless of the public character of the road, this easement having been in existence for more than fifty years; that the complainant thereupon prayed that an injunction be issued restraining the defendant from building the fence, and from maintaining the fence as built, so far as completed. An injunction was granted by Chancellor Wikle on *ex parte* application, and was issued in accordance with the prayer of the bill. Subsequently in this case, proceedings in contempt were brought

against the defendant because of his failure to obey the injunction. He filed an answer in which he averred that he had obeyed the injunction, so far as it restrained him from committing any further acts, but that the fence, so far as actually constructed, had been erected before the bill was filed, and it was insisted that, in so far as the injunction was mandatory, it was granted without jurisdiction because it was a granting of final relief on a mere *ex parte* application made at the beginning of the suit. Evidence was introduced and a judgment of contempt was awarded against the defendant, under which he was fined $25 and the costs of the proceeding. From this judgment he has appealed to this court. A motion is now made to transfer the case to the court of civil appeals, on the ground that the controversy is within the jurisdiction of that court. This motion is resisted on the ground that a contempt proceeding is a criminal proceeding, and the court of civil appeals has no jurisdiction of a criminal case.

While it is true that a contempt proceeding is of a criminal nature, it is also in the nature of a civil proceeding. By this is meant that proceedings for ascertaining the existence of a contempt may be purely civil in the court in which the contempt arises, but that it is an offense against public justice, and may be proceeded against also by indictment or presentment, and that, whichever form of procedure may be adopted, the punishment is a criminal punishment, which is either by fine or by fine and imprisonment.

The fact that the contempt proceeding has this dual nature does not prevent its prosecution in any court wherein a contempt occurs, although it be a court of purely civil jurisdiction. The power of courts to punish for contempt is of immemorial antiquity, and is inherent in all courts as a necessary power belonging to them in order to enable them to accomplish the purposes for which they were designed; that is, the orderly trial and decision of causes, the enforcement of public order, the prevention of interferences with their proceedings, and the enforcement of the due respect belonging to them as institutions of the country. While this power may be regulated by the legislature, it is not conferred. Bailey on Habeas Corpus, pp. 219-260; 2 Broom & Hadley's Commentaries, 567-569, 435, and 436; 1 Bacon's Abridgement, 473; 2 Id., 633, 634.

To what extent the power may be regulated by legislation we need not inquire, as the present case does not raise the question.

Inasmuch as the power is inherent in all courts, and each court can conduct such a matter arising in any case before it, it is apparent that the contempt proceeding in the present case was merely an incident to the power of the chancery court in the road controversy, and therefore the jurisdiction on appeal from the decision of that court in the main controversy would control the jurisdiction on the merely incidental matter of a contempt arising in the case. Since the controversy over the road would, under chapter 82 of

the Acts of 1907, belong to the Court of Civil Appeals, it follows that the contempt proceeding arising in that case would likewise belong to that court. We may add that, so far as concerns the implied suggestion that courts of chancery would not have power over a contempt proceeding, it is to be noted, as laid down in Broom & Hadley's Commentaries, supra, that originally "the whole process of a court of equity, in the several stages of a cause, and finally to enforce its decree, was, till the introduction of sequestrations, in the nature of a process of contempt, acting only *in personam*, and not *in rem*."

The motion to transfer must therefore be granted.

BRANSFORD REALTY CO. *v.* ANDREWS.

(*Nashville.* December Term, 1913.)

1. **TRUSTS. Appointment of trustees. Parties.**

Both under the general equity practice and Shannon's Code, sec. 5429, providing that upon the death of a trustee a new trustee may be appointed, upon application by the beneficiaries by petition making all necesary parties defendant, the question of the necessity of parties rests in the discretion of the chancery court, being largely a question of expediency; and hence, while all persons interested should generally be made parties, the court of chancery having jurisdiction of the trust *res* may proceed, although contingent remaindermen were not parties. (*Post, pp.* 729-734.)

2. **TRUSTS. Trustees. Appointment. Parties.**

In a proceeding to appoint a trustee to succeed a deceased trustee, the heirs of the deceased trustee are not necessary parties, for they have no power respecting the trust estate or any interest therein, except the naked legal title. (*Post, pp.* 729-734.)

Code cited and construed: Sec. 5429 (S.).

Cases cited and distinguished: Wooldridge v. Planters' Bank, 33 Tenn., 297; Williams et al. v. Neil et al., 51 Tenn., 279.

Cases cited and approved: Bright v. Bright, 62 Tenn., 109; Williamson v. Wickersham, 43 Tenn., 52; Watkins v. Specht, 47 Tenn., 587; Birdsong v. Birdsong, 39 Tenn., 289-302; Milbank v. Crane, 25 How. Prac. (N. Y.), 193; Dyer v. Leach, 91 Cal., 191; Freeman v. Prendergast, 94 Ga., 369.

3. **TRUSTS. Trustees. Appointment. Attack.**

While by reason of lack of parties the appointment of a trustee may be irregular, still, where the omitted parties were only contingent remaindermen and the heirs of a deceased trustee, the appointment is at most irregular, and cannot be collaterally attacked. (*Post, p.* 734.)

Cases cited and approved: Freeman v. Prendergast, 94 Ga., 369; Milbank v. Crane, 25 How. Prac. (N. Y.), 193.

4. TRUSTS. Proceedings for reinvestment. Necessary parties.

A decree providing for the sale of trust property is not invalid because the ultimate contingent remaindermen were not parties to the proceeding; such persons being represented by the life tenant and those then claiming the vested remainder. (*Post, pp.* 734-736.)

Cases cited and approved: Andrews v. Andrews, 54 Tenn., 234; Freeman v. Freeman, 56 Tenn., 301; Rutherford v. Rutherford, 116 Tenn., 383; Miller v. Texas & Pacific R. Co. et al., 132 U. S., 662, distinguishing McArthur v. Scott, 113 U. S., 340; Glasscock v. Tate, 107 Tenn., 486.

5. TRUSTS. Sale of trust property for reinvestment. Title of purchaser.

In view of Shannon's Code, sec. 5085, providing that the purchasers of property judicially sold for reinvestment shall take good title if the provisions of the law have been substantially complied with, notwithstanding the errors of the court, a decree providing for the sale of trust property passes good title to the purchaser, who paid his money into court, even though it did not sufficiently protect the interests of contingent remaindermen, for while the proceeds of such sale must, under section 5087, be reinvested for the benefit of the parties interested, the purchaser is not charged with any trust to see to the reinvestment. (*Post, pp.* 736-738.)

Code cited and construed: Secs. 5085, 5087 (S.).

Cases cited and approved: Beaumont v. Beaumont, 54 Tenn., 226; Knotts v. Stearns, 91 U. S., 638; Winchester v. Winchester, 38 Tenn., 460.

Case cited and distinguished: Ridley v. Halliday, 106 Tenn., 619.

FROM DAVIDSON.

Appeal from Chancery Court, Davidson County. —Jno. Allison, Chancellor.

Bailey & Edwards, for appellant.

Smith & Berry, for appellee.

Mr. Justice Green delivered the opinion of the Court.

This bill was filed to enforce specific performance of a written contract whereby the defendant, J. D. Andrews, agreed to purchase for the sum of $3,000 a certain lot in what is known as the Bransford Realty Company's West End Heights subdivision near the city of Nashville.

After entering into the contract aforesaid, the defendant declined to complete it, insisting that complainant's title was defective. This bill was filed for specific performance, and to recover of defendant the purchase price agreed on of $3,000. A demurrer was interposed by defendant, which the chancellor sustained, and complainant has appealed to this court.

The lot in question is a part of a tract of land formerly belonging to the estate of Chas. Bosley, and was acquired by the complainant at a chancery sale in the case of *Gertrude B. Whitworth et al.* v. *Goodloe Lindsley, Agent, et al.*

Under the will of Charles Bosley, the said tract of land, together with other property, was devised to his executors in trust for his granddaughter, Gertrude Bosley Bolling (now Gertrude B. Whitworth), for life,

and at her death to her children, or the survivors of such as might then be dead, and, in default of issue, then, after the payment of $15,000, to Gerard Brandon and wife, of Mississippi, remainder to those persons who would have been the heirs of testator, had he died at the time of the death of Gertrude Bosley Bolling.

Following the testator's death by certain proceedings, not in question here, J. L. Whitworth was appointed trustee after the death or resignation of the testamentary trustees, and later W. L. Horn was appointed trustee upon the death of J. L. Whitworth.

In the case of *Gertrude B. Whitworth et al.* v. *Goodloe Lindsley, Agent, et al.*, above referred to, the bill was filed for a sale, for reinvestment, of the tract of land purchased by the Bransford Realty Company. To this suit Gertrude B. Whitworth, the life tenant, her two children, W. L. Horn, then trustee, and the proposed purchasers, were made parties. The bill showed an offer for the said tract by the proposed purchasers. A reference was had, the offer reported to be advantageous, and a sale acordingly made and confirmed. The purchase price was paid into the chancery court under a decree that will be more fully noticed hereafter.

The demurrer filed herein by defendant, Andrews, raises three questions as to the title of the Bransford Realty Company to the said property.

The objections to the title are these:

(1) That W. L. Horn was not properly appointed trustee of the Bosley estate, and the legal title to said

estate was therefore not represented in the case of *Gertrude B. Whitworth et al.* v. *Goodloe Lindsley, Agent, et al.*

(2) That all necessary parties were not before the court in the case of *Gertrude B. Whitworth et al.* v. *Goodle Lindsley, Agent, et al.*, in which case the said tract of land was sold.

(3) That proper provision was not made in the decree of sale for the protection of the contingent remaindermen under the Bosley will, and that the purchaser did not acquire a good title as against such remaindermen.

Considering these objections in the order made, we will first dispose of the contention as to the appointment of W. L. Horn, trustee.

This appointment seems to have been made by the chancery court of Davidson county upon petition of Mrs. Whitworth, filed in a cause there pending, relative to the administration of the Bosley estate. Neither the heirs of J. L. Whitworth, the former trustee, nor the contingent remaindermen, were made parties to this petition. It is said that the appointment of this trustee was invalid by reason of failure to make such persons parties to these proceedings.

It is not absolutely essential for the life tenant and immediate beneficiary of a trust estate, in petitioning for the appointment of a new trustee, to make the remaindermen parties. This question has been expressly decided as indicated in the case of *Bright* v. *Bright*, 3

Baxt., 109. We are not aware that the rule announced in this case has been modified.

The practice would be the same, whether the proceedings for the appointment of a new trustee be regarded as statutory or under the inherent jurisdiction of the chancery court. Section 5429, Shannon's Code, merely requires all necessary parties to be made defendants. The chancellor must, in either case, determine what parties are necessary.

While it is doubtless better practice to bring in all avilable persons in interest, the question of parties, at least in a court of equity, upon an application of this sort, is largely a question of expediency, and rests in the discretion of the court. As will appear from the authorities later reviewed, the appointment of a trustee will not in subsequent proceedings, be held invalid merely because all those interested in the trust were not before the court when such trustee was desig nated.

We have two cases, *Williamson* v. *Wickersham,* 3 Cold., 52, and *Watkins* v. *Specht,* 7 Cold., 587, which apparently do hold that the heirs of a deceased trustee are necessary parties in proceedings to appoint his successor. The first case seems to proceed on the theory that, inasmuch as the legal title in a trustee passes to his heirs upon his death, it is necessary to make these heirs parties in order to divest the title out of them and to vest it in the new trustee. The latter case undertakes a distinction between proceedings for the appointment of a successor to a trustee under a deed

and a testamentary trustee. Both these cases dealt with the appointment of trustees by courts of law.

In so far as *Williamson et al.* v. *Wickersham* and *Watkins* v. *Specht,* supra, hold that the heirs of a testamentary trustee are necessary parties to proceedings for the appointment of his successor, at least in the chancery court, we are not inclined to follow them. They are out of harmony with other expressions of this court.

In the case of *Wooldridge* v. *Planter's Bank,* 1 Sneed, 297, the trustee had resigned. His resignation was accepted by the chancery court, and another appointed in his room and stead; but there was no divestiture of the title of the real estate conveyed in the deeds of trust, or any vesting of the title in the new trustee. The court said:

"What, then, becomes of the legal title to the trust property, upon resignation of the trustee? This is a question by no means free from difficulty. To hold that the title still remains in the trustee, after he is formerly discharged of the trust, would seem absurd. Upon this construction of the act, the resignation of the trustee and appointment of another in his stead would be alike inoperative; because, while it would fail to discharge the first trustee effectually from all but future liability, it would leave his successor destitute of the power of exercising legal control over the property for the want of the title. To give the act any sensible construction or effect, it must be held, therefore, that upon the discharge of the first trustee by implica-

tion of law the title is transferred to and becomes vested in the successor appointed by the court; and for the same reason, a like construction and effect must be given to the decree of the chancellor." *Wooldridge* v. *Planters' Bank, supra.*

In the later case of *Williams et al.* v. *Neil et al.*, 4 Haisk., 279, referring to the reasoning of the court in the former case, it was said:

"This reasoning, it would seem to us, would be much stronger in favor of the vesting of the title in the new trustee, by implication of law, in case of the death of the trustee, where the sole purpose of the conveyance was, not to vest a descendible and beneficial estate in the trustee, but only an estate, in order that he might execute a power of sale contained in the deed creating the trust. It might well be held that the estate was in the trustee during his life, and technically descended as a naked, dry legal title to his heirs, on his death, subject, however, to be divested by implication of law, and vested in a new trustee, when appointed, and that the only parties necessary in such proceeding to appoint a new trustee were the maker of the deed and the beneficiaries in the deed, unless an account was sought of the personal representatives of the deceased trustee."

We can see no necessity for making the heirs of a deceased trustee parties to such proceedings. They have no power respecting the trust estate, nor any interest therein—no rights which they can assert and which it is necessary to cut off. They have but a naked

title, and this is effectually divested, as pointed out in the cases last quoted, by amplication of law, upon the appointment of a new trustee. Respecting parties to suits in equity, this court has made the following observation:

"The general rule, requiring all persons in interest to be made parties to the suit, is, in most cases, not, in any just sense, a right of the parties brought before the court, but rather a rule prescribed by courts of equity to themselves in the exercise of their jurisdiction, founded upon their notions of the public policy, or public convenience. It is, in a great measure, a rule of discretion, founded in the anxiety of those courts to do justice among all the parties having an interest in the subject-matter or object of the suit, whether that interest be mediate or immediate, present or future, for the purpose of suppressing future controversy and litigation." Story's Eq. Pl. 135a; *Birdsong* v. *Birdsong,* 2 Head, 289- 302.

The prevailing rule is that while one applying for the appointment of the new trustee should make parties of all persons beneficially interested, still this is a rule chiefly of convenience, and not founded on any general principle. It has been said that the jurisdiction of a court of equity in such a case is a "*quasi* jurisdiction *in rem,* a power over the trust and is not acquired by the service of process upon the *cestui que trust* or other persons interested in the trust fund or its preservation." *Millbank* v. *Crane,* 25 How. Prac.

(N. Y.), 193; *Dyer* v. *Leach*, 91 Cal., 191, 27 Pac., 598, 25 Am. St. Rep., 171; 39 Cyc., 287.

In the case of *Freeman* v. *Prendergast*, 94 Ga., 369, 21 S. E., 837, Judge Lumpkin makes an elaborate review of the authorities upon this subject. The conclusion reached is that in proceedings for the appointment of a trustee the question of parties is a matter within the discretion of the court. It is said this result is particularly satisfactory in cases where a bond is required of the trustee which fully protects all persons interested, regardless of the individuality of the person appointed.

Even though, by reason of lack of parties, the appointment of a trustee should be considered irregular, still an appointment under such circumstances would be irregular only, and not void. Such a decree would not be subject to collateral attack. *Freeman* v. *Prendergast*, 94 Ga., 369, 21 S. E., 837; *Milbank* v. *Crane*, 25 How. Prac. (N. Y.), 193; 29 Cyc., 290.

So upon full consideration we conclude that the appointment of Mr. Horn as trustee for the Bosley estate was valid, and cannot be questioned by the defendant herein.

The second objection made to the title by the defendant is that neither Garard Brandon, nor his wife, nor those persons who will be the heirs of Charles Bosley at the time of the death of his granddaughter, were made parties to the case of *Gertrude B. Whitworth et al.* v. *Goodloe Lindsley, Agent, et al.* As heretofore stated, she, the life tenant, was a party, her two chil-

dren were parties, and the trustee was a party to this suit. We think that a valid decree of sale was made, with these parties before the court.

The doctrine of virtual representation is thoroughly established in Tennessee. It is well settled that contingent limitations and executory devises to persons not in being, or uncertain and indeterminable at the time of the proceedings, may be bound by a decree against the person then claiming the vested estate. In suits to enforce a trust, or with reference to trust property, so limited in remainder, if the holder of the legal title, the life tenant, and the persons in being in whom the remainder would become a vested estate if the life estate then fell in—if all these are parties, a valid decree may be pronounced. *Andrews* v. *Andrews*, 7 Heisk., 234; *Freeman* v. *Freeman*, 9 Heisk., 301; *Rutherford* v. *Rutherford*, 116 Tenn., 383, 92 S. W., 1112, 115 Am. St. Rep., 799. See, also, *Miller* v. *Texas & Pacific R. Co. et al.*, 132 U. S., 662, 10 Sup. Ct., 206, 33 L. Ed., 487. This case distinguishes *McArthur* v. *Scott*, 113 U. S., 340, 5 Sup. Ct., 652, 28 L. Ed., 1015, relied on by defendant.

In the case of *Glasscock* v. *Tate*, 107 Tenn., 486, 64 S. W., 715, the court held certain partition proceedings invalid because neither the living trustee nor the ultimate contingent remaindermen were made parties. What was there said as to the necessity of making the ultimate contingent remaindermen a party was probably *dictum*. The decision could well have been rested on the failure to make the living trustee a party. At

any rate, the ultimate contingent remaindermen in *Glasscock* v. *Tate,* was a corporation, Cumberland University, a fixed and certain entity.

In this case the ultimate contingent remaindermen are uncertain and indeterminable at this time. This case falls within the rule we have undertaken to lay down, and that rule is in entire harmony with *Glasscock* v. *Tate,* supra.

So we conclude that all necessary parties were before the court in the case of *Gertrude B. Whitworth et al.* v. *Goodloe Lindsey, Agent, et al.*

The last objection made to the title in this case is that the decree of sale did not sufficiently protect the interests of the contingent remaindermen, and for this reason it is said the Bransford Realty Company did not acquire a good title.

Counsel for the defendant rely on the observation of this court in *Ridley* v. *Halliday,* 106 Tenn., 619, 61 S. W., 1028, 53 L. R. A., 477, 82 Am. St. Rep., 902, to the effect that: "In each case it is essential that the interests of the contingent remaindermen in the proceedings of the converted property be preserved by the decree directing the conversion." The decree in the case of *Gertrude B. Whitworth et al.* v. *Goodloe Lindsley, Agent, et al.,* recited that the purpose of the proposed sale therein was to change the form of the investment, and that the proceeds arising therefrom would be invested in other real estate subject to the same conditions, provisions, and limitations under which the title to the property was then held.

Such was the language of the decree confirming the sale, and upon the handing down of said decree the Bransford Realty Company paid the purchase price for this tract of land into court. As we have seen, all necessary parties were before the court, and the decree recited that the proceeds of the sale were thereafter to be invested upon the same conditions and limitations under which the realty was held.

We are of opinion that the purchaser was discharged from all obligation to look after the disposition of the purchase money when it was paid into court upon conditions such as these. The court had jurisdiction of the parties and the subject-matter, and had indicated in its decree a purpose to properly reinvest the proceeds of the sale and preserve the interest of the contingent remaindermen.

It was held in *Beaumont* v. *Beaumont*, 7 Heisk., 226, that the title of a purchaser at a judicial sale could not be in any way affected by the failure of the court to order the investment of funds paid in by him. As stated by counsel, this holding has become a rule of property in this State. It is sound, and in accord with the weight of authority, and we see no reason to depart from it.

While section 5087 of Shannon's Code requires the proceeds of such sales to be reinvested for the benefit of parties interested, we think the purchaser is discharged when he pays his money into the court under a proper decree of sale, reciting that the fund is received for reinvestment. He is not required to follow

up the case and see to the reinvestment of the fund for the protection of remote contingent remaindermen. That is the court's duty. The interest of the first takers in remainder and of the ultimate contingent remaindermen is the same. The theory of the law is that the first takers in remainder will look after the common advantage. It is upon this theory that the rule of virtual representation rests.

See *Knotts* v. *Stearns*, 91 U. S., 638, 23 L. Ed., 252; 2 Daniell's Chan. Pl. & Pr., p. 1276; *Winchester* v. *Winchester*, 1 Head, 460. Also see Shannon's Code, sec. 5085.

Upon the whole case, we are of opinion that complainant had a good title to the lot in question, and is entitled to the relief sought. The chancellor's decree will be reversed, and defendant will pay all costs.

INDEX.

ACCEPTANCE AND DELIVERY.

1. *Carriers. Carriage of goods. Connecting carriers. Liability. Delivery.*

   The fact that the cars were customarily hauled by an engine of the connecting carrier to the track where they were inspected, for which a charge was made against the initial carrier, does not show actual possession by the connecting carrier before inspection and acceptance. *Farnsworth-Evans Co.* v. *Railroad*, 50.

2. *Carriers. Carriage of goods. Connecting carriers. Liability. Delivery.*

   Nor was the lodgment of the waybills with the agent, even though he be considered the agent of the connecting carrier, conclusive of delivery, so long as the physical movement to the track where the cars were inspected remained to be made by the first carrier. *Ib.*

ACTIONS—RIGHT AND CAUSE.

1. *Equity. Jurisdiction of court of chancery. "All civil causes of action."*

   Under Shannon's Code, sec. 6109, extending the jurisdiction of the chancery court to all civil causes of action triable in the circuit court, except for injuries to person, property, or character involving unliquidated damages, the words "all civil causes of action" mean only those civil actions which could have originated in the circuit court; the purpose of the act being to give litigants the option of bringing suits either in the circuit or the chancery court. *Swift & Co.* v. *Warehouse Co.*, 82.

2. *Release. Joint tort-feasors. Statutes.*

   Shannon's Code, sec. 5570, providing that all releases, whether of a debt of record, or a contract under seal, or otherwise, shall have effect according to the intention of the parties, is confined to actions *ex contractu* only, and does not change the common law rule governing the release of one joint tort-feasor. *Smith* v. *Amusement Co.*, 112.

3. *Appeal and Error. Review. Questions not raised below.*

   In a proceeding to collect an inheritance tax, where no objection that the tax was not then due was made in the circuit court, the immaturity of the action was waived, and could not be urged on appeal. *Deen* v. *Crenshaw*, 123.

ACTIONS—RIGHT AND CAUSE.

ACTIONS—RIGHT AND CAUSE—Continued.

4. *Death. Cause of action. Statutes. Interstate commerce employee.*

Act April 22, 1908, known as the Employers' Liability Act, ch. 149, sec. 1, 35 Stat., 65 (U. S. Comp. St. Supp., 1911, p. 1322), declares a carrier by railroad liable in damages to a "person suffering injury" while employed by it in interstate commerce, or, in case of his death, to his personal representative, for the benefit of certain relatives. Section 9, added to such chapter by Act April 5, 1910, ch. 143, sec. 2, 86 Stat., 291 (U. S. Comp. St. Sup., 1911, p. 1325), provides that any right of action given by this act to a "person suffering injury" shall survive to his representative. *Held*, that section 9 creates no new cause of action, but merely preserves, by survival, the cause of action given the employee, and therefore has no application where there is an instantaneous killing, right of action for the killing in such case being given the personal representative. *Carolina* v. *Shewalter*, 363.

5. *Death. Action for benefit of relatives.*

To authorize recovery for the benefit of the father of an adult son instantly killed while employed by a railroad in interstate commerce, under Act April 22, 1908, ch. 149, sec. 1, 35 Stat., 65 (U. S. Comp. St. Supp., 1911, p. 1322), merely declaring the company liable in damages, it must be shown the father had reasonable expectation of pecuniary assistance or support from deceased. *Ib.*

6. *Insurance. Losses. Demand and refusal. Penalty. Time of action.*

Under Acts 1901, ch. 141, declaring an insurance company, when a loss occurs, and it refuses to pay it within sixty days after demand, liable to pay the policy holder a penalty in addition to the loss, suit must be delayed sixty days after demand only when the company does not answer the demand within that time, and, the refusal being sooner, suit may be commenced immediately thereafter. *Thompson* v. *Life & Accident Co.*, 526.

7. *Insurance. Losses. Demand and refusal. Penalty.*

Where, on refusal to pay an indemnity under an accident and sick benefit policy, bill therefor and for the penalty provided by Acts 1901, ch. 141, was filed, and, additional losses thereafter accruing, amended and supplemental bills to recover them were filed, more than sixty days having elapsed before their filing, the filing of the bill was a sufficient demand, and the filing of the answers, denying liability, a refusal to pay

ACTIONS—RIGHT AND CAUSE.

as regards right to recover penalty on the additional losses. *Ib.*

8. *Carriers, Freight. Delivery without bill of lading.*
Though a railroad company wrongfully delivered grain without the surrender of the bill of lading as required by it, the consignors had no right of action against it if they were not injured because they had received payment for the grain. *Bank* v. *Railroad*, 530.

9. *Justices of the Peace. Process. Sufficiency.*
A warrant issued by a justice of the peace in the form prescribed by shannon's Code, sec. 5958, calling upon defendant to answer "in a civil action on an account under five hundred dollars," was sufficient as against an objection that it failed to state a cause of action. *Nichols* v. *Turnpike Co.*, 541.

10. *Gaming. Recovery of money lost. Parties entitled to recover. Statutes. Construction.*
Shannon's Code, sec. 3162, authorizing actions to recover for the benefit of the wife or children of the loser of money in a gambling transaction, does not limit the right to recover for the benefit of minor children of a loser in a gaming transaction, but a recovery may be had for the benefit of adult children. *Coles* v. *Morrow*, 550.

11. *Abatement and Revival. Survival of causes of action. Libel.*
An action may be maintained against an executor as such for damages from a libel contained in a will published by the probate thereof, the maxim, "*Actio personalis moritur cum persona*" not applying, since the right of action did not exist in the lifetime of the testator. *Harris* v. *Trust Co.*, 573.

12. *Torts. Right of action*
That no precedent can be found for an action in tort, though to be considered, will not of itself prevent relief; the determinative question being whether a wrong has been inflicted for which plaintiff is entitled to recover lawful damages. *Ib.*

13. *Abatement and Revival. Survival of causes of action.*
The maxim, "*Actio personalis moritur cum persona*," is based upon no very satisfactory reason, and is not favored by the courts. *Ib.*

14. *Abatement and Revival. Survival of causes of action. Statutory provisions.*
Shannon's Code, sec. 4569, provides that no civil action commenced whether founded on wrongs or contracts, "except actions for wrongs affecting the character of the plaintiff" shall abate by the death of either party, but may be revived. *Held*,

ACTS CITED AND CONSTRUED.

ACTIONS—RIGHT AND CAUSE—Continued.

that the exception as to wrongs affecting the character of plaintiff did not defeat an action based on a libel contained in a will first published after the testator's death, as that action relates only to actions commenced during the lifetime of the deceased party. *Harris v. Trust Co.*, 573.

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1909, ch. 192. Courts. Appellate jurisdiction. Statutory provisions. *Bank &Trust Co.* v. *Walker*, 22.

1909, ch. 1. Jury. Waiver. Effect as to punishment. *Metzner* v. *State*, 45.

1877, ch. 97. Equity. Jurisdiction of court of chancery. "All civil causes of action." "Liquidated damages." Statutory provisions. Repeal by implication. *Swift & Co.* v. *Warehouse Co.*, 82.

1893, ch. 174. Taxatian. Inheritance tax. Appraisement and judgment. Collection, Attorney's fees. Appeal and error. Review. Questions not raised below. *Deen* v. *Crenshaw*, 123.

1870-71, ch 36. Statutes. Title of Act. Crimes. Amending Act. *Butler* v. *State*, 164.

1899, ch. 356. Railroads. Construction. Highway crossings. Statute. Construction. *Railroad* v. *State*, 172.

1891, ch. 31, 1893, ch. 41. Municipal corporations. Public improvements. Damages. Changing grade of streets. *Mayor & Aldermen* v. *Barton*, 177.

1909, ch. 593. Municipal Corporations. Ordinances. Reference. *Operating Co.* v. *Chattanooga*, 196.

1789, ch. 57. Fraudulent conveyances. Judgment. Creditor's suit. Issues, proof, and variance. *Mahoney-Jones Co.* v. *Sams Bros.*, 207.

1895, ch. 160, 1899, ch. 31. Insurance. Insurable interest. Necessity. *Marquet* v. *Insurance Co.*, 213.

1875, ch. 43. Costs. Statutes. Repeal. By implication. *State ex rel.*, v. *Drummond*, 271.

1875, ch. 142, 1887, ch. 16, 1893, ch. 11. Courts. Rules of decision. Previous decisions. *Railroad* v. *Transportation Co.*, 277.

1801, ch. 6, 1837-38, ch. 176, 1907, ch. 334. Adverse possession. Possession of separate tracts. Evidence. Recital of deed. Effect. *Camp* v. *Riddle*, 294.

1903, ch. 103. Municipal corporations. Governmental powers. Exclusive franchise. *Noe* v. *Mayor and Aldermen*, 350.

ADMINISTRATION OF ESTATES.

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1908, ch. 149. Death. Cause of Action. Statutes. Interstate commerce employee. Action for benefit of relatives. *Carolina* v. *Shewalter*, 363.

1909, ch. 169, 1911, ch. 620. Taxation. Statutory provisions. Equality and uniformity. *King* v. *Sullivan County*, 393.

1907, ch. 149, sec. 25, Railroads. Street crossings. Police power. Constitutional Law. *Chattanooga* v. *Railroad*, 399.

1903, ch. 140, sec. 1. Contracts. Lessening competition. Sale of business. *Baird* v. *Smith*, 410.

1877, ch. 31, 1891, ch. 122, 1895, ch. 81. Commerce. Interstate commerce. Corporations. Foreign corporations. "Doing business" within the State. Noncompliance with Statutes. Effect. *Amusement Co.* v. *Albert*, 417.

1911, ch. 32. Homicide. Appeal. Harmless error. Failure to instruct. *Jones* v. *State*, 493.

1877, ch. 31; 1891, ch. 122, 1895, ch. 81. Corporations. Foreign corporations. Licensing of foreign corporations. *Adams* v. *Chattanooga Co.*, 505.

1901, ch. 141. Insurance. Losses. Demand and refusal. Penalty. Time of action. *Thompson* v. *Life & Accident Co.*, 526.

1901, ch. 141. Principal and Surety. Fidelity bond. Loss. Failure to pay. Penalty. *Grain Co.* v. *Weaver*, 609.

1907, ch. 602, sec. 30. Constitutional Law. Taxation Due process of law. Tax proceedings. Hearing. Interested party. Back taxes. Assessment. Hearing before assessing officers, Notice. Judges. Judicial officers. County trustee. Compensation. Departments of government. Judicial powers. County trustee. Statutes. Application. Manufacturing corporations. Exemption. *Fertilizer Co.* v. *McFall*, 645.

1907, ch. 82. Contempt. Appellate Jurisdiciton. *Graham* v. *Williamson*, 720.

ADMINISTRATION OF ESTATES.

Executors and Administrators. Appointment of administrator. Jurisdiction of courts. Existence of assets.

Under Shannon's Code, sec. 3935, providing that letters of administration may be granted upon the estate of a nonresident, by the county court of any county in this State where the deceased had any goods, chattels, or assets at the time of his death, where at the time a nonresident was killed in a county in this State he had on his person personal property of the value of $35, such property would support adminis-

AGENCY.

ADMINISTRATION OF ESTATES—Continued.

tration in such county; its value, or the fact that it was on his person rather than elsewhere, being immaterial. *Anderson* v. *Railroad*, 244.

Executors and Administrators. Assets. Property subject.

A pistol, a gold watch, a gold badge of an order, and money belonging to a decendent were all subject to administration, none of such property being exempt. *Ib.*

Executors and Administrators. Assets. Property subject.

Where a nonresident at the time of his death left property in K. county, administration might be had in that county, although subsequent to his death some one without authority sent such property to his wife in another state, since the parties responsible could be made to answer for such removal. *Ib.*

Executors and Administrators. Title of administrator.

The property of a decedent vests in his administrator, when appointed, by relation from the date of the death. *Ib.*

Executors and administrators. Deeds.

A deed conveying estate land made by an executor to himself for a grossly inadequate consideration was voidable at the instance of the persons injured. *Camp* v. *Riddle*, 294.

AGENCY.

1. *Insurance. Fire insurance. Contracts by foreign insurance companies. Validity.*

Under Shannon's Code, secs. 3274-3369, making it unlawful for any insurance company to make a contract of insurance, except as authorized by law, and prescribing the terms on which foreign insurance companies may be authorized to do business in the state, and making any person soliciting insurance on behalf of a foreign insurance company not complying with the law guilty of a misdemeanor, and authorizing licensed insurance brokers to place insurance with foreign companies, a contract of insurance made by a foreign insurance company not authorized to do business in the state, through an agent not an insurance broker, is unlawful. *Woolwine* v. *Mason*, 35.

2. *Insurance. Fire insurance. Unlawful contracts. Liability of agent.*

Under Shannon's Code, sec. 3316, making an agent personally liable on all contracts of insurance unlawfully made by him in behalf of any insurance company not authorized to do business in the State, an agent not a licensed insurance broker,

ALIBI.

AGENCY—Continued.

who procures through another agent in a sister State insurance contracts from foreign insurance companies not authorized to do business in the State, is liable to the amount of the policies so obtained, though insured knew of the violation of the law. *Ib.*

3. *Factors. "Conversion" by factor. Assertion of ownership.*
Though as a general rule any assertion of dominion over the personal property of another against his will is a conversion, and the defendant cannot justify by showing that he had no notice of complainant's rights, yet, where a cotton factor received cotton for sale in good faith, and paid over the proceeds to the person purporting to be the true owner before notice of the owner's rights, and had neither property nor proceeds in his possession when demand was made by the owner, he could not be said to have knowingly or consciously asserted any claim to the property or its proceeds against the owner, and there was consequently no "conversion." *Fargason* v. *Ball*, 137.

4. *Chattel Mortgages. Foreign mortgage.*
Though a mortgagee of property under a foreign mortgage, duly recorded and valid in the foreign jurisdiction, can recover the property from a purchaser without knowledge in this State, yet, where cotton covered by a mortgage duly recorded in a foreign State was consigned, without the knowledge or consent of the mortgagee, to a cotton factor in this State, the mortgagee could not recover from the factor, after he had in good faith sold the property and turned over the proceeds to his principal, since the contest was not over the property or proceeds. *Ib.*

5. *Principal and Agent. Collection of note. Payment at bank.*
That a note is made payable at a particular bank, or at any bank, does not make the bank the owner's agent to receive payment, if the note is not placed by him with the bank. *Stansbury* v. *Embrey*, 103.

ALIBI.

Criminal Law. Instructions.
While it is better to treat an alibi as a point of evidence, and not as a defense, an instruction that the defense of alibi, when clearly and fully established by the proof, is a perfect defense, but that the jury should consider the proof with strictness and caution, as it is easily concocted, is not erroneous, where it

APPEAL AND ERROR.

ALIBI—Continued.

also states that if, weighing the proof of the alibi impartially in connection with all the circumstances in the case, the jury have a reasonable doubt as to the defendant's presence at the place of the crime, they should acquit him; any impropiety in the use of the words "when clearly and fully established by the proof," as requiring proof beyond a reasonable doubt, being sufficiently corrected by the rest of the instruction, so as not to mislead the jury. *Odeneal* v. *State*, 60.

APPEAL AND ERROR.

1. *Criminal Law. Bill of exceptions. Evidence on motion for new trial.*

Where the bill of exceptions in a criminal case does not state that it contains all the evidence in support of a motion for new trial, error in not granting the motion on the ground of newly discovered evidence cannot be considered. *Odeneal* v. *State*, 60.

2. *Record. Questions presented for review. Expert witness. Fees.*

In an inheritance tax proceeding, an allowance of $30 to an expert witness on the value of real estate could not be held erroneous, where the facts upon which the trial court acted were not before the supreme court. *Deen* v. *Crenshaw*, 123.

3. *Review. Questions not raised below.*

In a proceeding to collect an inheritance tax, where no objection that the tax was not then due was made in the circuit court, the immaturity of the action was waived, and could not be urged on appeal. *Ib.*

4. *Scope of review. Pleading. Demurrers.*

While ordinarily a demurrer bad in part must be overruled altogether, the supreme court, since the enactment of the statute allowing appeals from decrees overruling demurrers, may, when the decision would greatly narrow the litigation, depart from that rule, and determine the propriety of one ground of demurrer, though another ground is bad. *Operating Co.* v. *Chattanooga*, 196.

5. *Assignments of error. Necessity.*

In an action against an employer and two of its employees for false imprisonment, assault and slander, in which a verdict was rendered against the employer and in favor of the employees, where it appeared that other employees not sued assisted in inflicting the injuries complained of, the supreme court could not, in the absence of an assignment of error that there was no evidence to support the verdict against the employer examine the evidence for the purpose of determining whether there was evidence sustaining the employer's liability, aside from the evidence as to the conduct of the employees

APPROPRIATIONS.

APPEAL AND ERROR—Continued.

exonerated by the verdict, and hence would affirm the judgment. *Loveman Co.* v. *Bayless*, 307.

6. *Homicide. Issues. Second degree murder.*
In view of Shannon's Code, sec. 6441, requiring the jury to ascertain in their verdict whether the offense is murder in the first or second degree, it was error, on trial of an indictment for murder, for the court not to instruct on second degree murder. *Jones* v. *State*, 493.

7. *Homicide. Trial. Direction of verdict.*
In a prosecution for homicide, where accused pleaded not guilty, though he admitted the firing of the fatal shot, claiming that it was caused by his nervousness, and that he was only attempting to rob deceased, it is reversible error for the court to charge that the only question for the jury to determine was whether accused was guilty of murder in the first degree with mitigating circumstances, for Shannon's Code, sec. 6441, declares that the jury before whom an offender is tried shall ascertain whether it is murder in the first or second degree, and if accused confess his guilt, the court shall determine the degree of crime by the verdict of a jury, and the court, not having the power to set aside the verdict of a jury, cannot, as it practically did in this case, direct a verdict of guilty or pass on any question of fact. *Shipp* v. *State*, 499.

8. *Review. Harmless error.*
Notwithstanding the provisions of Acts 1911, ch. 32, providing that no judgment shall be set aside for any error not affecting the result of the trial, the giving of an instruction, in a personal injury action against a street railway company, outlining defendant's theory of the accident and charging the jury that if they should find it to be true to find for defendant, is so prejudical as to necessitate a reversal, particularly where other instructions authorized a finding for plaintiff on a slight preponderance of evidence and the statute declaring defendant's liability for its negligence was read to the jury, without qualification. *Railway & Light Co.* v. *Dungey*, 587.

APPROPRIATIONS.

Statutes. Enactment at extraordinary session. Proclamation of governor. "Maintain."
An appropriation of $25,000 to the National Conservation Exposition Company, a corporation, created for the purposes of holding expositions, encouraging and supporting agriculture, industrial enterprises, and the breeding of blooded live stock

and poultry, made by the legislature in extraordinary session, and contained in the general appropriation bill under the head of "Department of Agriculture," was not embraced within the call of the governor, which was "to make such appropriations of the public moneys as may be deemed necessary and proper to maintain the State's institutions, offices and departments," since, though some of the purposes of the corporation were identical with those of the agricultural department, and it, in carrying out its purposes, might indirectly aid the department, it was a separate institution in no way connected with the agricultural department, and the word "maintain" as used in the governor's call meant, if not direct maintenance by an appropriation to the department itself, at least one under its control; hence the appropriation was void, because in violation of Const., art. 3, sec. 9, authorizing the governor to convene the general assembly by a proclamation limiting their power specifically to the purposes for which they are convened. *State ex rel.* v. *Woollen*, 456.

ARRESTS AND REWARDS.

1. *Rewards. Actions. Evidence. Efficient cause of arrest.*
   Where a reward was offered for the arrest and delivery to the sheriff of a culprit, and a police officer, in searching for the culprit in reliance upon the reward, made the arrest, but the prisoner escaped, and on pursuit surrendered to plaintiff, who was in the front of the pursuit, the officer was the efficient cause of the arrest, and not plaintiff. *Stair* v. *Congregation*, 190.
2. *Rewards. Who may receive. Efficient cause of arrest.*
   The rules governing the interpretation of ordinary contracts are to be applied in the construction of a published reward for an arrest or other service, and the better rule is that he who is the active and efficient cause in securing the result described in an offer of reward is the one entitled thereto. *Ib.*
3. *Rewards. Who may receive. Police officer.*
   A police officer is precluded by public policy from demanding or enforcing a reward for an arrest, but the fact that a reward was voluntarily paid an officer after notice that a private citizen claimed it does not enlarge the rights of such citizen, or entitle him thereto, where the officer, rather than he, was the efficient cause of the arrest. *Ib.*

ASSIGNMENTS—ATTORNEYS.

ARRESTS AND REWARDS—Continued.

4. *Rewards. Who may receive. "Arrests."*
Where a citizen joined the pursuit of a prisoner, who had escaped from an officer, and the culprit surrendered to him while immediate and continuous pursuit was being made by the officer and others, such action did not constitute a second arrest, and it was not an "arrest" within the meaning of an offer of reward. *Ib.*

5. *Rewards. Apportionment. Necessity of concert of action.*
Where there is no concert of action when the endeavor to gain a reward is entered upon, he alone is entitled to it who first substantially complies with the offer; and where a prisoner escaped from an officer, and in the pursuit surrendered to a citizen, there was no sufficient concert of action to entitle such citizen to a portion of the reward. *Ib.*

ASSIGNMENTS.

Assignments for Benefit of Creditors. Set-off.
The debtor of an insolvent creditor, who has assigned, for the benefit of creditors, the obligation evidencing the indebtedness, may set off against the demand in the hands of the assignee any indebtedness, whether matured or unmatured due from the insolvent. *Lumber Co.* v. *Lumber Co.*, 11.

ATTACHMENT.

Corporations. Transfer of assets. Remedies of creditors.
A fund due to a corporation, which sold all of its property to another corporation, which fund had been assigned to the purchaser, was not subject to levy or attachment in an action at law against the seller, and hence a bill in equity against the seller and purchaser could be maintained by a judgment creditor of the seller to reach such fund. *Jennings, Neff & Co.* v. *Ice Co.*, 231.

ATTORNEYS.

Taxation. Inheritance tax. Collection. Attorney's fees.
On appeal in a proceeding for the collection of an inheritance tax, in which the county court taxed an attorney's fee for the attorney of the clerk of the county court, the supreme court could make such reduction in the fee allowed as would bring it down to a reasonable amount, and commensurate with the work done and the responsibility assumed. *Deen* v. *Crewshaw*, 123.

ATTRACTIVE NUISANCE—BANKS AND BANKING.

ATTRACTIVE NUISANCE.

1. *Negligence.*

   The owner of dangerous machinery, naturally attractive to a child, is liable for injuries to one attracted thereto, while the machinery is on the owner's premises. *Doyle* v. *Chattanooga*, 433.

2. *Municipal Corporations. Defective streets.*

   A city was responsible for the death of boys eleven and nine years of age by drowning in a pond which occupied the whole width of a public street, about 120 feet from a public park, in analogy to the rule imposing liability for maintaining an attractive nuisance. *Ib.*

BAILMENTS.

1. *Degree of care.*

   A bailee for hire is required to exercise only ordinary care, which is that which a capable person engaged in the same work is accustomed to exercise. *Swift & Co.* v. *Warehouse Co.*, 82.

2. *Equity. Warehousemen. Injuries to property. Liquidated Damages.*

   Where a warehouseman stored eggs, issuing a receipt stating that the property was stored at the owner's risk, that its condition and quality were unknown, but that it would be returned to the owner at his request, the contract is a mere bailment for hire, obligating the bailee to use ordinary care, and the law cannot by implication raise an agreement on the part of the warehouseman to return to the owner eggs of good and merchantable quality, or to pay the difference between the market value of stored eggs of good quality and the value of the eggs actually redelivered; hence an action for damages to the eggs stored is necessarily one for unliquidated damages. *Ib.*

BANKS AND BANKING.

1. *Set-off by depositor.*

   Although the Negotiable Instruments Law (Laws 1899, ch. 94) declares that the maker shall be primarily liable for the payment of a negotiable instrument, nevertheless, where one who signed as maker seeks to set off his deposit in an insolvent bank against his liability to the bank on the note, he will not be treated as the real party in interest, where he signed

BANKS AND BANKING.

BANKS AND BANKING—Continued.

for the benefit of his comaker in order to enable him to negotiate the instrument. *Knaffle* v. *Trust Co.*, 181.

2. *Equitable set-off by depositor.*

Where a depositor in a bank signed a note to the bank as comaker, merely for the accommodation of the real maker and to enable him to negotiate it, the depositor will not, upon the insolvency of the bank, be permitted to set off against his liability on the note his rights against the bank based upon his deposit therein; it appearing that the real maker was not yet insolvent and that the bank had not sought to subject the depositor to liability, for to permit him such a right would work injustice by means of an equitable set-off. *Ib.*

3. *Equitable set-off by depositor.*

Upon the insolvency of a bank, unmatured claims against it will be treated as matured, for the purpose of enabling the holder to obtain the right of equitable set-off. *Ib.*

4. *Collection of drafts. Nature of deposit. Intention of parties.*

In determining whether a draft was received by a bank for collection only, or whether it became the absolute owner, where it was deposited subject to check under an agreement that if returned uncollected the bank should charge it back to the depositor, the intention of the parties, as evidenced by their acts, controls. *Implement Co.* v. *Bank*, 320.

5. *Deposit of drafts. Conditional sale.*

Where a draft was deposited with a bank subject to check up to its face value the same as a cash deposit, under an agreement, however, that if it was returned uncollected the bank could charge the amount of the credit back, the transaction was at most a conditional sale of the draft to the bank, conditioned upon the collection of the draft. *Ib.*

6. *Garnishment. Property subject. Bank deposits.*

Where a draft was deposited with a bank and full credit was given to the depositor as for a cash deposit under an agreement, however, that if the draft were not collected, the amount of the credit should be charged back to the depositor, the draft was subject to garnishment for the depositor's debts to the extent of his interest when the garnishment notice was served. *Ib.*

7. *Garnishment. Bank deposits.*

Where a draft deposited with a bank as a pledge for credit given to the depositor is garnished by the depositor's creditors, the bank must show the extent of its interest in the draft in order

to protect its own interest therein from the garnishment. *Ib.*

8. *Carriers. Bills of lading. Pledge as security.*

Where a draft made upon the purchaser of goods was deposited in a bank by the seller with the bill of lading attached, and a checking credit was given to the depositor under an agreement to charge back the amount should the draft be returned uncollected, the bill of lading was merely security for the collection of the draft, whether it were made out to the consignee or to the shipper's order. *Implement Co. v. Bank*, 320.

9. *Carriers. Bill of lading. Bona fide transferee.*

Complainant bank first accepted a bill of lading, covering a shipment of grain, and an attached draft on February 10th, and that draft and three other drafts against the same bill of lading were subsequently dishonored and taken up by the maker, and when the fifth draft was deposited, which was likewise dishonored and was not taken up, the bill of lading had been issued for more than three months. The grain covered by it was a domestic shipment to an adjoining State. *Held*, in view of the staleness of the bill of lading, that the bank was not an innocent transferee of the bill of lading and was estopped from recovering from the railroad company for negligently delivering the grain without the surrender of the bill of lading. *Bank* v. *Railroad*, 530.

BILL OF EXCEPTIONS.

1. *Criminal Law. Appeal and error. Evidence on motion for new trial.*

Where the bill of exceptions in a criminal case does not state that it contains all the evidence in support of a motion for new trial, error in not granting the motion on the ground of newly discovered evidence cannot be considered. *Odeneal* v. *State*, 60.

2. *Garnishment. Property subject. Bank deposits.*

Where a draft was deposited with a bank and full credit was given to the depositor as for a cash deposit under an agreement, however, that if the draft were not collected, the amount of the credit should be charged back to the depositor, the draft was subject to garnishment for the depositor's debts to the extent of his interest when the garnishment notice was served. *Implement Co.* v. *Bank*, 320.

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bank must show the extent of its interest in the draft in order to protect its own interest therein from the garnishment. *Ib.*

BILL OF LADING.

1. *Carriers. Bona fide transferee.*
Complainant bank first accepted a bill of lading, covering a shipment of grain, and an attached draft on February 10th, and that draft and three other drafts against the same bill of lading were subsequently dishonored and not taken up by the maker, and when the fifth draft was deposited, which was likewise dishonored and was not taken up, the bill of lading had been issued for more than three months. The grain covered by it was a domestic shipment to an adjoining State. *Held*, in view of the staleness of the bill of lading, that the bank was not an innocent transferee of the bill of lading and was estopped from recovering from the railroad company for negligently delivering the grain without the surrender of the bill of lading. *Bank* v. *Railroad*, 530.

2. *Carriers. Freight.*
A "bill of lading" is not a negotiable instrument but is merely a contract by a carrier to deliver the goods described at a particular place according to the usual course of transportation. *Ib.*

BILLS AND NOTES.

1. *Set-off and Counterclaim. Bills and notes. Indorser. Statutes.*
Negotiable Instruments Act (Laws 1899, ch. 94), sec. 50, providing that, where an instrument is negotiated back to a prior party, such party may, subject to the provisions of the act, reissue and further negotiate the same, but he is not entitled to enforce payment against any intervening party, when read in connection with section 121, providing that, where an instrument is paid by a party secondarily liable, it is not discharged, but the party so paying is remitted to his former rights, will not preclude an indorser of a promissory note, who paid the same upon the insolvency of the maker, from claiming a set-off against one to whom the maker had assigned a debt due from the indorser. *Lumber Co.* v. *Lumber Co.*, 11.

2. *Banks and Banking. Equitable set-off by depositor.*
Where a depositor in a bank signed a note to the bank as comaker, merely for the accommodation of the real maker

and to enable him to negotiate it, the depositor will not, upon the insolvency of the bank, be permitted to set off against his liability on the note his rights against the bank based upon his deposit therein; it appearing that the real maker was not yet insolvent and that the bank had not sought to subject the depositor to liability, for to permit him such a right would work injustice by means of an equitable set-off. *Knaffle* v. *Trust Co.*, 181.

3. *Principal and Agent. Collection of note. Payment at bank.*
That a note is made payable at a particular bank, or at any bank, does not make the bank the owner's agent to receive payment, if the note is not placed by him with the bank. *Stansbury* v. *Embrey*, 103.

4. *Tender. Payment at bank.*
The making of a note payable at a named bank entitles the maker to tender payment there; a tender there being available to prevent a forfeiture and stop the running of interest, though the note be not at that bank when payment is tendered. *Ib.*

5. *Place of payment.*
The making of notes payable "at any bank" in a city authorized the maker to require the holder of the notes to make his election at what bank he would receive payment, and on failure to elect, the maker could elect to make payment at a certain bank, and give notice of his election to the holder. *Ib.*

BONDS.

Principal and Surety. Fidelity bond. Conditions. Performance by employer. Omission. Rights of third persons.
Where a surety company executed a fidelity bond for the benefit of a bank, insuring against loss sustained by the issuance of fraudulent warehouse receipts by the alleged superintendent of a warehouse, which might be pledged by the warehouse company to the bank, the fact that the warehouse company misrepresented the employee's position as warehouse superintendent, when, in fact, he was a mere bookkeeper, and that the warehouse company failed to inform the surety of the employee's default, etc., did not relieve the surety from liability for such defaults to the bank; the bank being under no obligation to the surety company to see that such conditions of the bond were complied with. *Grain Co.* v. *Weaver*, 609.

BULK SALES ACT.

BROKERS AND BROKERAGE.

1. *Exchanges. Dealings. Parties.*

Where a broker, who was a member of a board of trade operating under rules authorizing members to act as brokers between other members only, except in the making of contracts between members and authorized agents of carriers, or insurance or banking companies in connection with their legitimate business, negotiated contracts of sale or purchase with another member, who disclosed the buyer or seller, and the contracts were confirmed, the contracts were the broker's own contracts, and not for the benefit of his customers not members, though the broker issued to each customer an instrument in the form of a confirmation of the contract of sale or purchase on his account. *Coles* v. *Morrow*, 550.

2. *Gaming. Gambling transactions. Purchase on margin.*

Where a customer dealt with a broker, who was a member of a board of trade, by purchasing grain on margin, without any purpose of receiving grain, and on the understanding that if the price declined so as to consume the margin, the customer should put up an additional margin or the broker could close out the transaction and charge the customer with the difference between the price at which the supposed purchase was made and the subsequent sale at market price, the transaction was a gambling transaction, and the money received by the broker in the conduct of his business was recovered by the customer. *Ib.*

BULK SALES ACT.

Fraudulent Conveyances. Bulk sales. Validity. Remedy of creditors of seller.

Where a retail merchant sold his stock in bulk without compliance with the Bulk Sales Act (Acts 1901, ch. 133), both parties being without actual intent to defraud, and paid over the proceeds to a part of his creditors, the sale was not absolutely void, so as to entitle an unpaid creditor to recover the value of the entire stock; but, the buyer being entitled to be subrogated to the claims of the creditors paid with its money, the plaintiff creditor could only recover the *pro rata* share of such value which was distributed to him. *Fecheimer-Keifer Co.* v. *Burton*, 682.

CARRIERS.

1. *Carriage of goods. Connecting carriers. Liability. Delivery.*
Where goods, shipped over the roads of two connecting carriers under a bill of lading providing that the legal remedy for loss or damage should be only against the particular carrier in whose custody they actually were, were destroyed by fire after they had been placed upon a spur track at the junction point, and after waybills had been delivered to the common agents of the carrier at that point, who had made the clerical entries showing the exchange, but the cars containing the shipment had not yet been inspected and accepted by the connecting carrier in accordance with its custom, there was no actual completed delivery to the connecting carrier, and the first carrier is liable for the loss. *Farnsworth-Evans Co.* v. *Railroad*, 50.

2. *Carriage of goods. Connecting carriers. Liability. Delivery.*
The fact that the cars were customarily hauled by an engine of the connecting carrier to the track where they were inspected, for which a charge was made against the initial carrier, does not show actual possession by the connecting carrier before inspection and acceptance. *Ib.*

3. *Carriage of goods. Connecting carriers. Liability. Delivery.*
Nor was the lodgment of the waybills with the agent, even though he be considered the agent of the connecting carrier, conclusive of delivery, so long as the physical movement to the track where the cars were inspected remained to be made by the first carrier. *Ib.*

4. *Carriage of live stock. Limitation of liability. Notice of claim.*
A clause in a contract for the shipment of live stock, which required notice in writing of a claim for damages for loss or injury to live stock before its removal or intermingling with other stock, does not apply to a claim for animals which died during the shipment, since notice of such loss is not required to enable a carrier to protect itself from fraudulent claims, and its agent must have known that the animals were dead, so that he could have made an immediate investigation. *Railroad* v. *Bacon*, 169.

5. *Freight. Delivery without bill of lading.*
Though a railroad company wrongfully delivered grain without the surrender of the bill of lading as required by it, the consignors had no right of action against it if they were not injured because they had received payment for the grain. *Bank* v. *Railroad*, 530.

CERTIORARI—CLAIMS AND COUNTERCLAIMS.

CARRIERS—Continued.

6. *Freight. "Bill of lading."*
A "bill of lading" is not a negotiable instrument but is merely a contract by a carrier to deliver the goods described at a particular place according to the usual course of transportation. *Ib.*

CERTIORARI.

Certiorari. Review. Moot cases.
In a suit to dissolve a corporation and distribute its assets, where the preferred stockholders were not before the court, it is improper for the court to construe the charter in relation to the rights of the preferred and common stockholders; that being a moot question not presented by the record. *Adams* v. *Chattanooga Co.*, 505.

CHANCERY COURTS.

1. *Corporations. Foreign corporations. Dissolution. Jurisdiction of courts.*
A court of chancery will not dissolve a foreign corporation domesticated in this State, where all of its assets are in a foreign jurisdiction, regardless of its authority to act, for its decree would be unenforceable. *Adams* v. *Chattanooga Co.*, 505.
2. *Corporations. Dissolution. Foreign corporations.*
Shannon's Code, secs. 5187, 6103, 6104, respectively declaring that a corporation is not dissolved by the nonuser or assignment of its powers and franchises, unless all its property has been appropriated to the payment of its debts, and any creditor or stockholder may file a bill to attach the corporate property, and have it applied to the payment of debts, and to have any surplus divided among the stockholders, and that in such cases the court may appoint a receiver, and take an account of the affairs of the corporation, and satisfy the debts, and divide the surplus, if any, apply not only to domestic corporations but to foreign corporations, and under them a court of chancery may dissolve a foreign corporation as to its property within the jurisdiction. *Ib.*

CLAIMS AND COUNTERCLAIMS.

1. *Right to set-off.*
Under Shannon's Code, sec. 4639, providing that a defendant may plead demands matured when offered in set-off, and any

CODE CITED AND CONSTRUED.

CLAIMS AND COUNTERCLAIMS—Continued.

equities between defendant and the original party under whom plaintiff claims, which by law have attached to the demand in plaintiff's hands, and for which defendant would be entitled to recover against the original party, the right of an indorser to compensation for the payment of a note of plaintiff's assignor is an equity which may be offered in a set-off in an action by the assignee; the assignor being insolvent. *Lumber Co.* v. *Lumber Co.*, 11.

2. *Rights of assignee.*
Where defendant was an indorser of a note given by plaintiff's assignor, the assignment of a debt due from defendant to the assignor will not preclude defendant from claiming an equitable set-off; it appearing that the assignor was insolvent at the time of the execution of the note and the making of the assignment, the bare fact that defendant did not pay the note until after the assignment not affecting its rights. *Ib.*

3. *Assigned rights. Rights of indorser.*
Where an indorser of a promissory note paid the same upon the default of the insolvent maker, the mere fact that the note was reassigned to the indorser will not preclude it from claiming to be treated as a surety, and so entitled to set off the note against a claim assigned by the maker to plaintiff. *Ib.*

4. *Equitable set-off. Nature.*
The remedy of equitable set-off may be enforced independently of the statutes, where from the nature of the claim or the situation of the parties it is impossible to obtain justice by plea or cross-action. *Knaffle v. Trust Co.*, 181.

5. *Banks and Banking. Equitable set-off by depositor.*
Upon the insolvency of a bank, unmatured claims against it will be treated as matured, for the purpose of enabling the holder to obtain the right of equitable set-off. *Ib.*

CODE CITED AND CONSTRUED.

§ 4639 (S.). Set-off and counterclaim. Right to set-off. *Lumber Co.* v. *Lumber Co.*, 11.

§§ 5801, 5804, 5810, 5818 (S.). Jury. Competency. Opinion concerning the law, "Good and lawful man." *Turner* v. *State*, 27.

§§ 3275, 3292, 3314, 3315, 3316, 3325-3341 (S.). Insurance. Fire Insurance. Contracts by foreign insurance companies. Validity. Unlawful contracts. Liability of agent. *Woolwine* v. *Mason*, 35.

CODE CITED AND CONSTRUED.

CODE CITED AND CONSTRUED—Continued.

§ 6576 (S.). Embezzlement. Acts constituting. Statutes. Construction. *Insurance Co.* v. *Nelson*, 70.

§§ 6109 (S.), 6131 (S.), 4321 (T. & S. and 1858), 4446 (S.), 2755 (T. & S. and 1858). Equity. Jurisdiction of court of chancery. "All civil causes of action." "Liquidated damages." Statutory provisions. Repeal by implication. "Jurisdiction." Consent. Waiver. Limitation of actions. New action after reversal. *Swift & Co.* v. *Warehouse Co.*, 82.

§ 6496, subsec. 8 (S.). Statutes. Title of act. Crimes. Amending act. Trespass. Cutting timber. Defenses. Right of possession. *Butler* v. *State*, 164.

§ 5570 (S.). Release. Joint tort-feasors. Statutes. *Smith* v. *Amusement Co.*, 112.

§§ 1392-1394 (T. & S. and 1858). Municipal corporations. Public improvements. Damages. Changing grade of streets. *Mayor & Aldermen* v. *Barton*, 177.

§ 4486 (S.). Fraudulent conveyances. Judgment. Creditor's suit. Issues, proof, and variance. Partnership. Liability for firm debts. *Mahoney-Jones Co.* v. *Sams Bros.*, 207.

§ 3935 (S.). Executors and administrators. Appointment of administrator. Jurisdiction of courts. Existence of assets. *Anderson* v. *Railroad*, 244.

§ 449, subsec. 3 (S.), § 36 (T. & S. and 1858), § 6412 (S.). Costs. Statutes. Repeal. Prisons. Care of prisoners. Sheriff's fees. Liability of county. "Boarding." *State, ex rel.*, v. *Drummond*, 271.

§§ 1861-1866 (S.). Eminent domain. Appropriation of land. Exclusive remedies. *Railroad* v. *Transportation Co.*, 277.

§ 5915 (S.). Adverse possession. Possession of separate tracts.

§ 1069 (S.). Counties. Officers. Eligibility and qualification. "Office." *Day* v. *Sharp*, 340.

§ 3159 (S.). Insurance. Insurable interest. Necessity. *Marquet* v. *Insurance Co.*, 213.

§§ 6438, 6439, 6440, 6441 (S.). Homicide. Issues. Second degree murder. Appeal. Harmless error. Failure to instruct. *Jones* v. *State*, 493.

§ 6441 (S.). Homicide. Trial. Direction of verdict. *Shipp* v. *State*, 499.

§§ 5187, 6103, 6104 (S.). Corporations. Dissolution. Foreign corporations. Right to dissolve. *Adams* v. *Chattanooga Co.*, 505.

§ 5958 (S.). Justices of the peace. Process. Sufficiency. *Nichols* v. *Turnpike Co.*, 541.

CONSTITUTION CITED—CONSTITUTIONAL LAW.

CODE CITED AND CONSTRUED—Continued.

§ 3162 (S.). Gaming. Recovery of money lost. Parties entitled to recover. Statutes. Construction. *Coles* v. *Morrow*, 550.

§§ 4788, 4789 (S.). Justices of the peace. Execution. Stay. Liability of stayor. *Puckett* v. *Griffith*, 565.

§ 6565 (S.). Executors and administrators. Actions. *Harris* v. *Trust Co.*, 573.

§ 4569 (S.). Abatement and revival. Survival of causes of action. Statutory provisions. *Harris* v. *Trust Co.*, 573.

§§ 5085, 5087 (S.). Trusts. Sale of trust property for reinvestment. Title of purchaser. *Realty Co.* v. *Andrews*, 725.

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§ 14, art. 6. Jury. Waiver. Effect as to punishment. *Metzner* v. *State*, 45.

§ 17, art. 2. Statutes. Title of acts. Validity. *Railroad* v. *Transportation Co.*, 277.

§ 25, art. 2. Counties. Officers. Eligibility and qualification. "Office." *Day* v. *Sharp*, 340.

§ 22, art. 1. Municipal corporations. Power to grant. Constitutional provisions. *Noe* v. *Mayor and Aldermen*, 350.

§ 28, art. 2. Taxation. Statutory provisions. Equality and uniformity. "Uniform taxation." *King* v. *Sullivan County*, 393.

§ 9, art. 3. Statutes. Powers of legislature. Extraordinary session. Appropriations. *State, ex rel.*, v. *Woollen*, 456.

CONSTITUTION OF UNITED STATES.

§ 10, art. 1. Constitutional law. Impairing obligation of contracts. *Chattanooga* v. *Railroad*, 399.

CONSTITUTIONAL LAW.

1. *Innkeepers. Due process of law.*

The statute does not violate Const., art. 1, sec. 8, prohibiting one from being deprived of property, except by the law of the land. *Nance* v. *Piano Co.*, 1.

2. *"Law of the land." Abolishing common law.*

The legislature is not prohibited from changing or abolishing the common law in force at the adoption of the State constitution, in the absence of restriction in the State or Federal Constitution; the phrase "law of the land" as used in the State Constution, merely referring to the common and statute law then existing, but not prohibiting the change of the common law. *Ib.*

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

3. *Courts. Equity. "Jurisdiction." Consent. Waiver.*
"Jurisdiction" is the power constitutionally conferred upon a judge or magistrate to determine causes according to law and carry his sentence into execution; hence as the act of 1877 (Shannon's Code, sec. 6109), specifically excepts certain causes from the jurisdiction of court of chancery, a party cannot, even by express waiver or consent, confer upon that tribunal jurisdiction to hear the excepted causes. *Swift & Co.* v. *Warehouse Co.*, 82.

4. *Jury. Waiver. Effect as to punishment.*
Under Const., art. 6, sec. 14, providing that no fine shall be laid on any citizen exceeding $50, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than $50, a person indicted for selling intoxicating liquors within four miles of a schoolhouse under Acts 1909, ch. 1, fixing the punishment therefor at a fine of not less than $50 nor more than $500, who waived a jury trial, could not be sentenced by the trial judge to pay a fine of more than $50, since the constitution has conferred upon juries exclusive jurisdiction to levy a fine exceeding that amount, and such jurisdiction cannot be conferred upon any other tribunal by consent or waiver of the parties. *Metzner* v. *State*, 45.

5. *Courts. Rules of decision. Previous decisions.*
Since Acts 1875, ch. 142, entitled "An act to provide for the organization of corporations," and subsequent amendments (Acts 1887, ch. 16; Acts 1893, ch. 11), all of which were entitled "An act to amend an act to provide for the organization of corporations," were held constitutional although they gave the various corporations organized thereunder the power of eminent domain, Acts 1901, ch. 138, entitled "An act to amend an act for the organization of corporations," and providing for the organization of flume companies, must be treated as constitutional, although giving such companies the right of eminent domain. *Railroad* v. *Transportation Co.*, 277.

6. *Counties. Officers. Eligibility and qualifications. "Office."*
Const., art. 2, sec. 25, provides that no person who has been a collector or holder of public moneys shall hold any other State office until he shall have accounted for and paid into the treasury all sums for which he may be liable. Shannon's Code, sec. 1069, excepts from eligibility to office defaulters to the treasury at the time of election and declares the election of such person void. Defendant's election to the office of

trustee of a county was void because he was then a defaulter, and after a judgment by the inducting authority that he was ineligible, but that a vacancy was thereby created, he settled his default and was elected by the county court to such office. *Held*, on petition of resistance to his induction therein, that the word "office," as used in the constitution and statute, implied the right to exercise the functions of a public trust or employment and to receive the fees and emoluments belonging to it and to hold the place for the term prescribed by law; that "office for a term" was an entity; and that the removal of an officer for disqualification did not operate to divide the term or create a new and distinct term, so that the default and consequent disqualification did not merely affect a part of the term but made him ineligible for election by the county court to hold the remnant of the term. *Day* v. *Sharp*, 340.

7. *Municipal corporations. Power to grant. Constitutional provisions.*

Under Const., art. 1, sec. 22, forbidding perpetuities, and monopolies, the legislature cannot confer upon a municipality the power to grant an exclusive franchise for the conduct of a business which is of common right. *Noe* v. *Mayor and Aldermen*, 350.

8. *Municipal corporations. Governmental powers. Municipal slaughterhouse.*

While the legislature might authorize a municipal corporation to establish a single slaughterhouse, to be conducted by its own agents, it would have to provide that all persons having animals to be slaughtered should have the right to resort to that place to do their own slaughtering, or to have it done by their own agents, or the act would be unconstitutional. *Ib.*

9. *Taxation. Statutory provisions. Equality and uniformity. "Uniform taxation."*

Under Const., art. 2, sec. 28, providing that taxes shall be equal and uniform throughout the State, the uniformity required is limited to a uniformity in rate, assessment, and valuation of the particular tax involved, and has no reference to a uniformity of the sum total of taxes which a citizen is required to pay. *King* v. *Sullivan County*, 393.

10. *Impairing obligation of contracts.*

The matter of proper crossings of streets and railroads for the safety and welfare of the public is one within the police power, future exercise of which cannot be bargained away by

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

a city, so that Const. U. S., art. 1, sec. 10, forbidding passage of laws impairing obligation of contracts, is not contravened by Acts 1907, ch. 149, sec. 25, empowering a city, by ordinance, to require a railroad to build or replace bridges over its tracks at street crossings, and an ordinance requiring the company to build a new bridge at such a crossing, though prior to the act, in consideration of contribution by the company to a bridge there built, the city contracted with it to forever after maintain a suitable bridge there. *Chattanooga* v. *Railroad*, 399.

11. *Statutes. Powers of legislature. Extraordinary session. Appropriations.*

Under Const., art. 3, sec. 9, authorizing the governor, on extraordinary occasions, to convene the general assembly by proclamation, "in which he shall state specifically the purposes for which they are to convene, but they shall enter on no legislative business except that for which they were specifically called," the governor can limit the subject which the legislature can consider, and he can do this by the imposition of qualified matter upon a general subject; hence he could qualify the general subject "appropriations" by "necessary to maintain the State's institutions." *State, ex rel.*, v. *Woollen*, 456.

12. *Presumption in favor of validity.*

A presumption is always in favor of the constitutionality of an act. *Ib.*

13. *Taxation. Due process of law. Tax proceedings. Hearing. Interested party.*

Revenue Act 1907, ch. 602, sec. 30, requiring back tax proceedings to be instituted and heard before the county trustee, whose compensation, by section 48, is made to depend on the amount adjudged to be due from the taxpayer in such proceedings, does not for that reason deprive the taxpayer of due process of law in that the trustee is a party in interest, nor is the taxpayer for that reason deprived of a hearing in accordance with the "law of the land." *Fertilizer Co.* v. *McFall*, 645.

14. *Due process of law. Back tax proceedings. Notice. Time.*

The 10 days' notice provided by Revenue Act 1907, ch. 602, for an appeal from a county trustee's back tax assessment to the board of equalizers, was long enough to constitute due process of law. *Ib.*

CONTRACTS.

CONSTITUTIONAL LAW—Continued.

15. *Judges. Judicial officers. County trustee. Compensation. Back tax proceedings.*

The county trustee in making assessments of back taxes as provided by Revenue Act 1907, ch. 602, is not a judge of the Supreme or inferior courts, but exercises *quasi* judicial authority only, and is therefore not within Const., art. 6, secs. 7, 11, providing that such judges shall at stated times receive compensation for their services and shall not be allowed any fees or perquisites and shall not preside in the case in the event of which he may be interested. *Fertilizer Co. v. McFall*, 645.

16. *Departments of government. Judicial powers. County trustee.*

Revenue Act 1907, ch. 602, in so far as it vests *quasi* judicial authority in back tax proceedings on the county trustee, was not violative of Const., art. 6, sec. 1, vesting the judicial power of the State in the Supreme and other specified courts. *Ib.*

CONTRACTS.

1. *Equity. Warehousemen. Injuries to property. Liquidated Damages.*

Where a warehouseman stored eggs, issuing a receipt stating that the property was stored at the owner's risk, that its condition and quality were unknown, but that it would be returned to the owner at his request, the contract is a mere bailment for hire, obligating the bailee to use ordinary care, and the law cannot by implication raise an agreement on the part of the warehouseman to return to the owner eggs of good and merchantable quality, or to pay the difference between the market value of stored eggs of good quality and the value of the eggs actually redelivered; hence an action for damages to the eggs stored is necessarily one for unliquidated damages. *Swift & Co.* v. *Warehouse Co.*, 82.

2. *Release. Joint tort-feasors. Statutes.*

Shannon's Code, sec. 5570, providing that all releases, whether of a debt of record, or a contract under seal, or otherwise, shall have effect according to the intention of the parties, is confined to actions *ex contractu* only, and does not change the common law rule governing the release of one joint tort-feasor. *Smith* v. *Amusement Co.*, 112.

3. *Release. Joint tort-feasors. "Covenant not to sue" one joint wrongdoer. Effect.*

An instrument executed by a person sustaining a personal injury inflicted by joint wrongdoers, whereby he agrees to dis-

CONTRACTS.

CONTRACTS—Continued.

miss the suit against one of them, and not to reinstitute it, and whereby he agrees to hold him harmless from all liability by reason of the accident, is a "covenant not to sue," and is not a satisfaction of the liability of the other wrongdoer, and judgment may be recovered against him. *Ib.*

4. *Carriers. Carriage of live stock. Limitation of liability. Notice of claim.*

A clause in a contract for the shipment of live stock, which required notice in writing of a claim for damages for loss or injury to live stock before its removal or intermingling with other stock, does not apply to a claim for animals which died during the shipment, since notice of such loss is not required to enable a carrier to protect itself from fraudulent claims, and its agent must have known that the animals were dead, so that he could have made an immediate investigation. *Railroad* v. *Bacon*, 169.

5. *Construction. Extrinsic circumstances.*

A contract must be construed with reference to the situation of the parties, the business to which it relates, and its subject-matter. *Ib.*

6. *Insurance. Insurable interest. Necessity.*

A lack of insurable interest by the beneficiary in the life of the insured, where the insurance is taken out and paid for by the beneficiary as a speculation, vitiates the contract, especially in view of Acts, 1895, ch. 160, sec. 2, as amended by Acts 1899, ch. 31, defining a contract of insurance as an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the insured upon the destruction or injury, loss or damage, of something in which the other party had an insurable interest, and Shannon's Code, sec. 3159, providing that all contracts founded in whole or in part on a gambling or wagering consideration shall be void to the extent of such consideration. *Marquet* v. *Insurance Co.*, 213.

7. *Mechanics' Liens. Time for filing notice. Enlargement of contract.*

Within the statute giving materialmen thirty days from completion of the work provided by the contract within which to file notices of liens, they have thirty days from completion of the work as enlarged by amendment of the contract between the owner and contractor, though part of their material was furnished before such amendment and all of it was for the

work previously provided for by the contract. *Harrison* v. *Knafle*, 329.

8. *Lessening competition. Sale of business.*

The provision of a contract, by which one sells his stock of goods and the fixtures of his store, that he will not in that town for five years engage in business in competition with the buyer, does not "tend to lessen free and full competition" in the sale of articles that had become a part of the mass of the property in the State, in violation of Acts 1903, ch. 140, sec. 1; the meaning of "competition," or of undue or unreasonable restraint of trade, under the common law, not being changed by the statute. *Baird* v. *Smith*, 410.

9. *Commerce. Interstate commerce.*

Complainant operated a theatrical "circuit" by contracting as agent for the owners of various theaters to furnish theatrical talent in consideration of $10 a week for certain weeks in the year, and of five per cent. of the amount paid by the owners to each troupe of actors furnished by complainant; complainant's contract with the owner stipulating against liability for failure of any actors to fulfill their contracts or for delay in arriving at the particular city. *Held*, that such a contract, made by complainant, whose general offices were in Chicago, with defendant, to furnish various troupes of actors for playing in defendant's opera house in Chattanooga, Tenn., did not involve interstate commerce, so that complainant was subject to Tennessee laws in executing such contract. *Amusement Co.* v. *Albert*, 417.

10. *Corporations. Foreign corporations. "Doing business" within the State.*

Complainant, a foreign corporation, which maintained general offices in Chicago, Ill., was engaged in booking actors to play in various theaters, and received for its services a certain sum from the theater owner and a commission retained by him out of the actors' salaries and paid over to complainant. For the purpose of enlarging its business, complainant sent agents into Tennessee, and made such contracts from time to time with the owners of various theaters besides defendant, and had had much correspondence with the owners of various theaters in the State. The contract with defendant for furnishing theatrical troupes was finally signed and accepted by defendant in Tennessee. *Held*, that complainant was "doing business" within the State, within Acts 1877, ch. 31, Acts 1891, ch. 122, and Acts 1895, ch. 81, prohibiting foreign cor-

porations not complying with the statute from doing business in the State or maintaining any action, etc., so that complainant, not having complied with the statute, could not sue on that contract. *Ib.*

11. *Exchanges. Dealings. Parties.*

Where a broker, who was a member of a board of trade operating under rules authorizing members to act as brokers between other members only, except in the making of contracts between members and authorized agents of carriers, or insurance or banking companies in connection with their legitimate business, negotiated contracts of sale or purchase with another member, who disclosed the buyer or seller, and the contracts were confirmed, the contracts were the broker's own contracts, and not for the benefit of his customers not members, though the broker issued to each customer an instrument in the form of a confirmation of the contract of sale or purchase on his account. *Coles* v. *Morrow*, 550.

12. *Frauds, Statutes of. Sale of real property. Necessity of written contract.*

It is not necessary that a contract for the sale of real property be in writing, provided there is a writing which contains evidence of the essential terms of the oral contract, and which is signed by the party to be charged. *Lusky* v. *Keiser*, 705.

13. *Sale of land. Written memorandum.*

A written offer to purchase land when signed and accepted may constitute a memorandum of the contract sufficient to satisfy the statute of frauds, though it consist of several contracts. *Ib.*

14. *Selling of land. Written memorandum.*

Complainants executed to a broker a contract authorizing the latter to sell a tract of land belonging to one of them, the instrument containing a description of the land, the price and terms, and an agreement to make a deed to any good purchaser complying with the terms procured by the broker. The broker thereafter obtained defendant's consent to purchase, and induced her to sign an addenda on such contract reciting that she accepted the proposition. *Held*, that such contract was merely to define the relation between complainants and the broker, and that it did not constitute a sufficient memorandum of the contract between complainants and defendant to bind her to purchase under the statute of frauds. *Ib.*

CONTEMPT—CONVERSION.

CONTEMPT.

1. *Nature of proceeding.*
   A contempt proceeding is both civil and criminal in its nature in that proceedings to ascertain existence of a contempt may be purely civil in the court wherein it arises, but that it is an offense against public justice, and may be proceeded against also by indictment or presentment, and in either case the punishment either by fine or imprisonment is criminal. *Graham* v. *Williamson*, 720.
2. *Jurisdiction of proceedings.*
   The dual nature of a contempt proceeding as both civil and criminal does not prevent its prosecution in any court wherein a contempt occurs, though it be a court of purely civil jurisdiction. *Ib.*
3. *Power to punish.*
   The power to punish for contempt is inherent in all courts to enable them to accomplish the purposes for which they were designed, and, while it may be regulated by the legislature, it is not conferred. *Ib.*
4. *Appellate jurisdiction.*
   Contempt proceedings for failure to obey a preliminary injunction are merely an incident to the power of the chancery court in the main controversy, and hence jurisdiction on appeal from the decision in that controversy controls such jurisdiction in the contempt proceedings, and hence, where the main controversy, under Acts 1907, ch. 82, belongs to the court of civil appeals, the contempt proceeding likewise belongs to it. *Ib.*

CONVERSION.

Factors. "Conversion" by factor. Assertion of ownership.

Though as a general rule any assertion of dominion over the personal property of another against his will is a conversion, and the defendant cannot justify by showing that he had no notice of complainant's rights, yet, where a cotton factor received cotton for sale in good faith, and paid over the proceeds to the person purporting to be the true owner before notice of the owner's rights, and had neither property nor proceeds in his possession when demand was made by the owner, he could not be said t ohave knowingly or consciously asserted any claim to the property or its proceeds against the owner, and there was consequently no "conversion." *Fargason* v. *Ball*, 137.

CONVEYANCE—CORPORATIONS.

CONVEYANCE.

Husband and wife. Wife's separate estate. Conveyance to wife. Husband's request.

The rule that, where a stranger makes a conveyance to a wife, there must be apt words used to create a separate estate in the wife does not apply where the husband pays the consideration for the property and directs the conveyance to be made to the wife, in which case the rule is the same as if the conveyance were directly from the husband and the wife takes a separate estate which she may convey to her husband under Shannon's Code, sec. 4246. *Ferguson* v. *Booth*, 259.

CORPORATIONS.

1. *Transfer of assets. Rights of creditors.*

Corporate assets are a trust fund, at least to the extent that creditors are entitled in equity to payment of their debts before any distribution among stockholders, and creditors have a right to follow such assets into the hands of anyone not a holder in good faith in the ordinary course of business. *Jennings, Neff & Co.* v. *Ice Co.*, 231.

2. *Transfer of assets. Rights of creditors.*

Where a corporation, in consideration of its own stock and bonds, purchases all the assets of another corporation without provision for the seller's debts, the transaction is out of the ordinary course of business, and the circumstances of the case imply full knowledge on the part of the purchaser of all facts necessary to charge the property in its hands with the debts of the seller. *Ib.*

3. *Transfer of assets. Rights of creditors.*

Where a corporation pending a suit against it transferred all of its property to another corporation, which agreed to assume payment of certain debts not including the one in suit, "and none other," and the purchaser in exchange therefor issued its own stock and bonds which, without provision for the creditors of the seller, it permitted to be distributed among the seller's stockholders, most of whom were nonresidents, the purchaser was a party, with full notice, to the diversion of the trust fund, and as such held the property acquired by it impressed with the same trust with which it was originally charged, and was liable to the seller's creditors to the extent of the value of the property thus obtained; the creditors not being required to look alone to such stock and bonds. *Ib.*

CORPORATIONS.

CORPORATIONS—Continued.

4. *Foreign corporations. Noncompliance with statutes. Effect.*
A foreign corporation, which does not comply with Acts 1877, ch. 31, Acts 1891, ch. 122, and Acts 1895, ch. 81, cannot maintain an action arising out of business transacted within the State, even though the illegality of such transactions only appears from the proof, and not from the pleading. *Amusement Co.* v. *Albert*, 417.

5. *Foreign corporations. "Doing business."*
A foreign corporation is "doing business" within the State when it transacts therein some substantial part of its ordinary business, and its operations within the State do not consist of mere casual or occasional transactions. *Ib.*

6. *Foreign corporations. "Doing business."*
A foreign corporation is "doing business" within the State when it transacts therein some substantial part of its ordinary business, and its operations within the State do not consist of mere casual or occasional transactions. *Ib.*

7. *Foreign corporations. Licensing of foreign corporations.*
A foreign corporation doing business in the State under foreign corporation statutes (Acts 1877, ch. 31; Acts 1891, ch. 122: Acts 1895, ch. 81), requiring the filing of the charter with the secretary of State and the procurement of a license, is not a new entity, distinct from the foreign organization, and is domestic only as to property and acts within the jurisdiction. *Adams* v. *Chattanooga Co.*, 506.

8. *Foreign corporations. Dissolution. Jurisdiction of courts.*
A court of chancery will not dissolve a foreign corporation domesticated in the State, where all of its assets are in a foreign jurisdiction, regardless of its authority to act, for its decree would be unenforceable. *Ib.*

9. *Dissolution. Foreign corporations.*
Shannon's Code, secs. 5187, 6103, 6104, respectively declaring that a corporation is not dissolved by the nonuser or assignment of its powers and franchises, unless all its property has been appropriated to the payment of its debts, and any creditor or stockholder may file a bill to attach the corporate property, and have it applied to the payment of debts, and to have any surplus divided among the stockholders, and that in such cases the court may appoint a receiver, and take an account of the affairs of the corporation, and satisfy the debts, and divide the surplus, if any, apply not only to domestic corporations but to foreign corporations, and under them a

CORPORATIONS.

CORPORATIONS—Continued.

court of chancery may dissolve a foreign corporation as to its property within the jurisdiction. *Ib.*

10. *Dissolution. Right to dissolve.*

Complainants and others joined in forming a British corporation, chartered to acquire land and the stock of any companies owning land or doing business in Tennessee, to take or otherwise acquire stock in any company engaged in business which it was authorized to carry on, and to sell, hold, reissue, or otherwise deal with such stock and securities. The British corporation, which was formed to take over large tracts of land in Tennessee, did not develop them, but sold them to other corporations, receiving the shares of those companies in part payment. *Held* that, as it was not insolvent, and as the holding of such stocks was within its chartered powers, complainant stockholders were not entitled to dissolution, under Shannon's Code, sec. 5187, declaring that a corporation is not dissolved by the nonuser or assignment in whole or in part of its powers, franchises, and privileges, unless all of the corporate property has been appropriated to the payment of debts. *Ib.*

11. *Principal and surety. Fidelity bond. Warehouse superintendent. Fund.*

A corporation operating a grain warehouse, desiring to borrow money from a bank on warehouse receipts, appointed W., who, in fact, was a mere bookkeeper for the corporation, superintendent of the warehouse, and procured a fidelity bond from defendant surety company guaranteeing against loss arising from W.'s fraud in issuing warehouse receipts without having the grain in store. The bond contained a rider that it should not cover any loss except such as might grow out of the issuing of fraudulent receipts signed by W. in conjunction with an officer of the warehouse company, and only such receipts as should be pledged to complainant bank as collateral in the regular course of its business. *Held*, that, where W. executed receipts in conjunction with the president of the warehouse company for grain in excess of that stored, which receipts were thereupon pledged to the bank, W. thereby certified to a fact as of his own knowledge, and was guilty of fraud within the rider of the bond, though he had no actual knowledge of the falsity of the receipt, and though he, in fact, was not the superintendent of the warehouse, and performed no duties pertaining to such office. *Grain Co.* v. *Weaver*, 609.

COSTS.

CORPORATIONS—Continued.

12. *Taxation. Manufacturing corporations. Assignment of stock. Exemption.*

Revenue Act 1907, ch. 602, sec. 8, provides that all personal property shall be assessed under certain classes, class 6 including shares of stock, except when the corporate property or capital stock is assessed, in lieu of the shares of stock, as provided in section 22, which declares that each manufacturing corporation, whether foreign or domestic, shall pay an *ad valorem* on the actual cash value of its capital stock or corporate property, including franchises, easements, incorporeal rights and privileges, and all other corporate property, which shall not be less than the actual cash value of both its shares of stock and its bonded debt, etc. *Held*, that it was the legislative intention under such act to assess the capital stock and corporate property of all manufacturing corporations, whether foreign or domestic, and hence the shares of such corporations so assessed were exempt from further taxation. *Fertilizer Co.* v. *McFall*, 645.

COSTS.

1. *On appeal. Collection of inheritance tax.*

In a proceeding to appraise property subject to an inheritance tax against the heirs and administrator of a decedent, the county court rendered judgment against the heirs for the amount of the tax on the real estate, and against the administrator for a tax on certain personal property. On an appeal by the heirs alone, the circuit court sustained their exception only to the tax against the personal property. *Held*, that the only contest between the heirs and the State was in respect to the tax on the real estate, and, having lost this contest, they were properly taxable with the costs, notwithstanding the sustaining of the exception as to the tax against the administrator. *Deen* v. *Crenshaw*, 123.

2. *Statutes. Repeal.*

The Jarvis act (Laws 1897, ch. 20), which declares that neither the State nor any county shall be liable for costs or fees in any criminal prosecution, except in cases of certain felonies, or where the defendant has been sent to the workhouse under the small offense law, or where he has been convicted in a court of record and execution against him returned *nulla bona*, is a repeal by implication of all statutes, in force at the time of its passage, fixing liability upon the State or county for costs or fees in criminal prosecutions not within the exceptions. *State, ex rel.*, v. *Drummond*, 271.

CRIMINAL LAW—DAMAGES.

CRIMINAL LAW.

1. *Appeal. Waiver of error.*
   The fact that counsel both for the State and for accused took the position that he was guilty of first degree murder or entitled to acquittal on the ground of self-defense would not operate as a waiver of accused's right to have the question of second degree murder submitted. *Jones* v. *State*, 493.
2. *Trial. Direction of verdict.*
   In a prosecution for felony, where a plea of not guilty is interposed, the court can neither direct a verdict of guilty nor can it pass on any question of fact unfavorable to accused. *Shipp* v. *State*, 499.
3. *Evidence. Character of accused.*
   Where, in a prosecution for murder, accused testified as a witness and introduced evidence as to his good character for truth and veracity as a witness, this was not evidence of, nor did it put in issue, his character for peace or quietness. *Durham* v. *State*, 636.

DAMAGES.

1. *Master and servant. Injuries to servant. Actions. Jury question.*
   In a personal injury action, evidence *held* sufficient to show that the servant at the head house of defendant's mine was acting within the scope of his authority and about the business of the master, when he dumped coal into the chute and upon plaintiff. *Maness* v. *Coal Corporation*, 143.
2. *Carriers. Carriage of live stock. Limitation of liability. Notice of claim.*
   A clause in a contract for the shipment of live stock, which required notice in writing of a claim for damages for loss or injury to live stock before its removal or intermingling with other stock, does not apply to a claim for animals which died during the shipment, since notice of such loss is not required to enable a carrier to protect itself from fraudulent claims, and its agent must have known that the animals were dead, so that he could have made an immediate investigation. *Railroad* v. *Bacon*, 169.
3. *Municipal Corporations. Public Improvements. Damages. Changing grade of streets. "All benefits accruing."*
   Under Acts 1891, ch. 31, as amended by Acts 1893, ch. 41, the first section of which allows to an abutting property owner consequential damages incident to changing the grade of a

DAMAGES—Continued.

street, and the second section of which provides that "all benefits accruing" from such improvements shall be allowed to reduce the damages, "all benefits accruing" means accruing to the owner as owner of the particular property, not as a taxpayer or resident of the vicinity sharing benefits common to all. *Mayor & Aldermen* v. *Barton*, 177.

4. *Municipal Corporations. Public Improvements. Damages. Changing grade of streets.*

Acts 1891, ch. 31, as amended by Acts 1893, ch. 41, secs. 1, 2, relating to the allowance of damages to abutting property owners from a change in the grade of a street and the deduction of benefit, is to be given a liberal construction in favor of the citizen affected. *Ib.*

5. *Injunction. Right to maintain.*

That a flume company organized as a public service corporation will not transport for the public generally is no ground for an injunction in favor of one whose land abutted on the stream which led the flume and whose property had been taken without condemnation; the persons injured by the refusal of the company having their right of redress in appropriate proceedings, and the State having the right to dissolve the company for a breach of public duty. *Railroad* v. *Transportation Co.*, 277.

6. *Injunction. Denial. Recovery of damages.*

Where a riparian owner sought to enjoin a flume company from operating its flume, which it had placed through his land, without condemnation, and from appropriating the waters of a steam which ran through his property, and also damages, but alleged no ground of equitable jurisdiction save the right to injunctive relief, the denial of his injunction precludes the court of chancery from taking jurisdiction of his suit for damages. *Ib.*

7. *Death. Action for benefit of relatives.*

To authorize recovery for the benefit of the father of an adult son instantly killed while employed by a railroad in interstate commerce, under Act April 22, 1908, ch. 149, sec. 1, 35 Stat., 65 (U. S. Comp. St. Supp., 1911, p. 1322), merely declaring the company liable in damages, it must be shown the father had reasonable expectation of pecuniary assistance or support from deceased. *Carolina* v. *Shewalter*, 363.

8. *Master and servant. Master's liability. Servant's duty to obey rule. "Nondelegable."*

While in instances the giving of signals may be the nondelegable

DEBTOR AND CREDITOR.

duty of the master, the term "nondelegable" does not mean that the master may not impose upon a servant the duty of giving signals prescribed for his own safety, and where such signals are not given at such a place as his duty requires he cannot recover for injury resulting therefrom. *Zinc Co.* v. *Smith*, 447.

DEBTOR AND CREDITOR.

1. *Assignment for Benefit of Creditors. Set-off.*
   The debtor of an insolvent creditor, who has assigned, for the benefit of creditors, the obligation evidencing the indebtedness, may set off against the demand in the hands of the assignee any indebtedness, whether matured or unmatured due from the insolvent. *Lumber Co.* v. *Lumber Co.*, 11.
2. *Embezzlement. Acts Constituting. Statutes. Construction.*
   To establish embezzlement, under Shannon's Code, sec. 6576, punishing any officer, agent, or clerk of any company, or any clerk or agent of a firm or private person, who embezzles or fraudulently converts to his own use the money or property of another, which has come into his possession by virtue of his employment, it must appear that accused occupied the relation of officer, agent, or clerk, and that he fraudulently converted to his own use property of another, which came into his possession by virtue of the employment, and where the relation of debtor and creditor existed between accused and prosecutor at the time of the acts complained of there could be no embezzlement. *Insurance Co.* v. *Nelson*, 70.
3. *Corporations. Transfer of assets. Rights of creditors.*
   Corporate assets are a trust fund, at least to the extent that creditors are entitled in equity to payment of their debts before any distribution among stockholders, and creditors have a right to follow such assets into the hands of anyone not a holder in good faith in the ordinary course of business. *Jennings, Neff & Co.* v. *Ice Co.*, 231.
4. *Corporations. Transfer of assets. Rights of creditors.*
   Where a corporation, in consideration of its own stock and bonds, purchases all the assets of another corporation without provision for the seller's debts, the transaction is out of the ordinary course of business, and the circumstances of the case imply full knowledge on the part of the purchaser of all facts necessary to charge the property in its hands with the debts of the seller. *Ib.*

DEBTOR AND CREDITOR—Continued.

5. *Tender. Payment.*
   As a rule, it is sufficient if a debtor tenders payment of a note on the due date at the place of payment, even though the creditor be absent; the debtor not being required to follow the creditor. *Stansbury* v. *Embrey*, 103.
6. *Assignments for Benefit of Creditors. Sale of property.*
   In a special assignment in trust for creditors, a direction to sell "to the highest bidder either at public or private sale" imports a sale for cash, and, when the trustee and a preferred creditor assume to make a credit sale, they become absolutely responsible for the whole price. *Saunders* v. *Lanier*, 693.
7. *Principal and Surety. Discharge of sureties. Loss of other securities.*
   The security provided by a special assignment for creditors inured to the benefit of sureties on a note secured thereby, and, a portion thereof being lost by negligence of the payee in actively assisting to sell the trust property, and taking in part therefor an insolvent note, or in making a credit sale at all, he, and not the sureties, must bear the loss. *Ib.*

DEDICATION OF STREET.

1. *Acceptance. User.*
   The acceptance of a street by a municipality may be implied from a general and long-continued use thereof by the public as of right. *Doyle* v. *Chattanooga*, 433.
2. *Dedication. Acceptance of street.*
   The use of a street by the general public may operate as an acceptance thereof so as to bind the dedicator and make the dedication irrevocable. *Ib.*
3. *Municipal Corporations. Acceptance of streets.*
   If a strip, offered to be dedicated as a street, contains thereon a nuisance, such as a dangerous pond, slight acts of acceptance by the municipality would be sufficient to show an acceptance so as to make it liable for injuries arising from the pond. *Ib.*
4. *Dedication. Acceptance.*
   If the tract dedicated as a street is clearly defined as by a map, and the public use is practically of the whole tract dedicated, it is presumed that an act accepting a part of the tract dedicated is an acceptance of the whole. *Ib.*

DEEDS.

1. *Evidence. Documentary evidence. Recitals in deeds. Effect.*
   Particular recitals in a deed are conclusive evidence of the facts

recited, in actions in which the purpose of the deed is directly involved. *Ferguson* v. *Booth*, 259.

2. *Evidence. Documentary evidence. Recitals in deeds. Weight as evidence.*
Where the recitals in a deed which is collateral to the purpose of the action are particular and definite and are corroborated by the substantial evidence of the parties and are not contradicted by anything in the record, they may be accepted as true. *Ib.*

3. *Adverse Possession. Possession of separate tracts.*
The possession of one of several adjoining tracts conveyed by the same deed was not constructive possession of either of the other tracts, where the tracts were separately described by the deed, and where not covered by one general boundary. *Camp* v. *Riddle*, 294.

4. *Judicial Sales. Passing of title. Sale by master.*
A sufficient time did not, as a matter of law, elapse between December, 1876, when a decree directed a master to make a deed for land purchased at a judicial sale, and February 12, 1877, to vest legal title in the purchase without a deed, under the rule that title will vest in a purchaser within a reasonable time after a master is ordered to make a deed, if he does not do so. *Ib.*

5. *Executors and administrators. Deeds.*
A deed conveying estate land made by an executor to himself for a grossly inadequate consideration was voidable at the instance of the persons injured. *Ib.*

DEMURRER.

1. *Appeal and Error. Scope of review. Pleading.*
While ordinarily a demurrer bad in part must be overruled altogether, the supreme court, since the enactment of the statute allowing appeals from decrees overruling demurrers, may, when the decision would greatly narrow the litigation, depart from that rule and determine the propriety of one ground of demurrer, though another ground is bad. *Operating Co.* v. *Chattanooga*, 196.

2. *Equity. Pleading. Practice.*
Every reasonable presumption should be exercised in favor of a bill when assailed by demurrer. *Adams.* v. *Chattanooga Co.*, 505.

DIVORCE—EJECTMENT.

DIVORCE.

Death. Presumption from absence.

Where a wife procured a divorce and the degree enjoined the husband from attempting to have any relations with her or the minor children, and he thereafter left C., where his wife and children resided, and for some time resided in O., which place he subsequently left, evidence that he had not been heard from in C. by any member of his immediate family or others for seven years, with no evidence as to any inquiry made concerning him at O., his last known place of residence, was insufficient to raise a presumption of death. *Marquet* v. *Insurance Co.*, 213.

DUTIES OF OFFICERS.

States. Validity. Persons entitled to question.

The officers of the State upon whom is imposed the duty of disbursing the public funds can question the validity of an appropriation made by the legislature. *State, ex rel.*, v. *Woollen*, 456.

EASEMENTS.

Easements. Extent of right. Obstruction of gates.

The owner of a servient estate can establish and maintain suitable gates at the termini of an easement of way acquired by an adjoining owner of farming lands by prescription; the prescriptive period maturing while the lands were uninclosed woodland, during which no gates or bars were maintained. *Luster* v. *Garner*, 160.

EJECTMENT.

1. *Evidence. Documentary evidence. Recitals in deeds. Effect. Collateral issue.*

In ejectment between the heirs of a wife who conveyed property to her husband and the husband's grantees, the deed from the wife is collateral to the purpose of the action, and the recitals therein are only prima facie evidence of the facts recited, but they are evidence and receivable as such against all those claiming under the deed. *Ferguson* v. *Booth*, 259.

2. *Courts. Appellate jurisdiction.*

Where a bill charged that complainant was the owner of land and entitled to its possession, and that defendant entered thereon and was claiming it under a pretended title, appropriating rents and profits, and prayed for adjudication of the

title and for possession and rents, and the answer admitted possession, but denied complainant's title and right of possession, and set up defendant's own claim of title, and an amended bill reiterated complainant's claim, and attacked defendant's claim and sought to remove it as a cloud, the original bill made a case of ejectment of which the court of civil appeals has no jurisdiction under acts 1907, ch. 82, sec. 7; the relief sought in the amended bill being merely incidental thereto, and not devolving jurisdiction on that court. *Reeves* v. *Haynie*, 717.

ELECTIONS.

Counties. Officers. Eligibility and qualification. "Office."

Const., art. 2, sec. 25, provides that no person who has been a collector or holder of public moneys shall hold any other State office until he shall have accounted for and paid into the treasury all sums for which he may be liable. Shannon's Code, sec. 1069, excepts from eligibility to office defaulters to the treasury at the time of election and declares the election of such person void. Defendant's election to the office of trustee of a county was void because he was then a defaulter, and after a judgment by the inducting authority that he was ineligible, but that a vacancy was thereby created, he settled his default and was elected by the county court to such office. *Held*, on petition of resistance to his induction therein, that the word "office," as used in the constitution and statute, implied the right to exercise the functions of a public trust or employment and to receive the fees and emoluments belonging to it and to hold the place for the term prescribed by law; that "office for a term" was an entity; and that the removal of an officer for disqualification did not operate to divide the term or create a new and distinct term, so that the default and consequent disqualification did not merely affect a part of the term but made him ineligible for election by the county court to hold the remnant of the term. *Day* v. *Sharp*, 340.

EMBEZZLEMENT.

1. *Acts Constituting. Statutes. Construction.*

To establish embezzlement, under Shannon's Code, sec. 6576, punishing any officer, agent, or clerk of any company, or any clerk or agent of a firm or private person, who embezzles or fraudulently converts to his own use the money or property of another, which has come into his possession by virtue of

his employment, it must appear that accused occupied the relation of officer, agent, or clerk, and that he fraudulently converted to his own use property of another, which came into his possession by virtue of the employment, and where the relation of debtor and creditor existed between accused and prosecutor at the time of the acts complained of there could be no embezzlement. *Insurance Co.* v. *Nelson*, 70.

2. *Insurance. Fidelity insurance. Acts constituting.*

Where a general agent of an insurance company, authorized to appoint local agents, who reported to him the insurance effected by them and the amount of premiums, and remitted to him the premiums, he himself being required to report daily to the company the amount of premiums, and to make a monthly report showing balances due, which must be paid within 60 days, was permitted to deposit in his own name premiums collected and received from local agents without any objection from the company, which knew the facts and also that the general agent was the general agent of other insurance companies, and that he kept the funds of all the companies in his individual account in the banks, and checked on them all to meet the needs of his business, the agent, failing to account for premiums collected and deposited, was not guilty of embezzlement of the funds of the company, within a bond condition to reimburse the company for losses by embezzlement. *Ib.*

EMINENT DOMAIN.

1. *Appropriation of land. Exclusive remedies.*

Where land has been occupied by a public service corporation, which did not exercise its power of eminent domain, the remedy given the landowner by Shannon's Code, sec. 1865, to petition for a jury of inquest to assess the damages, or to bring an action at law for damages, is exclusive, and the landowner cannot bring ejectment or enjoin the corporation from using his land. *Railroad* v. *Transportation Co.*, 277.

2. *Eminent Domain. Power of condemnation. "Public use."*

That the number of persons who can use, and that the area served by a flume company, down whose flume lumber and bark from the mountains is floated, is small, will not render the flume a nonpublic use, for a public use may be limited to the inhabitants of a small or restricted locality, and hence the legislature could properly delegate the power of eminent domain to flume companies. *Ib.*

EQUITY.

EMINENT DOMAIN—Continued.

3. *Statutes. Title of acts. Validity.*
It being customary to endow public service corporations with the power of condemnation, an atc entitled "An act to provide for the organization of corporations" has a broad enough title to embrace a grant of such power, and consequently an amending act, entitled "An act to amend an act entitled 'An act to provide for the organization of corporations,'" which gave the power of eminent domain to flume corporations, is not invalid, under Const., art. 2, sec. 17, because the body of the act is broader than its caption. *Ib.*

EQUITY.

1. *Set-off and Counterclaim. Right to set-off.*
Under Shannon's Code, sec. 4639, providing that a defendant may plead demands matured when offered in set-off, and any equities between defendant and the original party under whom plaintiff claims, which by law have attached to the demand in plaintiff's hands, and for which defendant would be entitled to recover against the original party, the right of an indorser to compensation for the payment of a note of plaintiff's assignor is an equity which may be offered in a set-off in an action by the assignee; the assignor being insolvent. *Lumber Co.* v. *Lumber Co.*, 11.

2. *Set-off and Counterclaim. Rights of assignee.*
Where defendant was an indorser of a note given by plaintiff's assignor, the assignment of a debt due from defendant to the assignor will not preclude defendant from claiming an equitable set-off; it appearing that the assignor was insolvent at the time of the execution of the note and the making of the assignment, the bare fact that defendant did not pay the note until after the assignment not affecting its rights. *Ib.*

3. *Corporations. Transfer of assets. Remedies of creditors.*
A fund due to a corporation, which sold all of its property to another corporation, which fund had been assigned to the purchaser, was not subject to levy or attachment in an action at law against the seller, and hence a bill in equity against the seller and purchaser could be maintained by a judgment creditor of the seller to reach such fund. *Jennings, Neff & Co.* v. *Ice Co.*, 231.

4. *Judgment. Setting aside. Grounds.*
To justify a court of equity in setting aside a judgment at law, the complainant must prove not only fraud but that it was

ESTOPPEL—EVIDENCE.

EQUITY—Continued.

unmixed by any fault attributable to him, such as neglect or inattention. *Puckett* v. *Griffith*, 565.

ESTOPPEL.

1. *Equitable estoppel. Diligence.*
   One relying on an estoppel must have exercised such reasonable diligence as the circumstances require. *Bank* v. *Railroad*, 530.
2. *Equitable estoppel. Knowledge of parties.*
   Where both parties have the same means of ascertaining the truth, no estoppel can exist. *Ib.*
3. *Equitable estoppel. Negligence.*
   One who conducts himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss cannot invoke the doctrine of estoppel. *Ib.*
4. *Good faith.*
   One claiming the benefit of an estoppel must have proceeded with the utmost good faith. *Ib.*
5. *Negligence.*
   If a ground of estoppel is based on negligence, the negligence must have been the proximate cause of the conduct of the complaining party. *Ib.*

EVIDENCE.

1. *Homicide. Sufficiency. Cause of death.*
   In a prosecution for homicide, evidence *held* sufficient to show that the death of the deceased was due to the injury inflicted by the defendant, and not to the surgeons who operated after he was wounded. *Odeneal* v. *State*, 60.
2. *Death. Presumption from absence.*
   Where a wife procured a divorce and the decree enjoined the husband from attempting to have any relations with her or the minor children, and he thereafter left C., where his wife and children resided, and for some time resided in O., which place he subsequently left, evidence that he had not been heard from in C. by any member of his immediate family or others for seven years, with no evidence as to any inquiry made concerning him at O., his last known place of residence, was insufficient to raise a presumption of death. *Marquet* v. *Insurance Co.*, 213.
3. *Circumstantial evidence. Weight and sufficiency.*
   Proof of an essential fact must be had either direct or positive by witnesses who know the fact, or circumstantial by wit-

nesses who know and testify to facts which tend to establish or prove the essential fact, and only when the circumstances are, in the judgment of the court or jury, such as usually or necessarily attend the essential facts are they sufficient in law to warrant a verdict; judgment or decree establishing a fact which have not been proved by direct or positive evidence. *Ib.*

4. *Trial. Taking case from jury. Direction of verdict. Consideration of evidence.*

In passing on a motion by defendant for a peremptory instruction in his favor, it must be assumed that the evidence of plaintiff's witnesses is true. *Mayor and Aldermen* v. *Cain*, 250.

5. *Documentary evidence. Recitals in deeds. Effect.*

Particular recitals in a deed are conclusive evidence of the facts recited, in actions in which the purpose of the deed is directly involved. *Ferguson* v. *Booth*, 259.

6. *Documentary evidence. Recitals in deeds. Effect. Collateral issue.*

In ejectment between the heirs of a wife who conveyed property to her husband and the husband's grantees, the deed from the wife is collateral to the purpose of the action, and the recitals therein are only prima facie evidence of the facts recited, but they are evidence and receivable as such against all those claiming under the deed. *Ib.*

7. *Documentary evidence. Recitals in deeds. Weight as evidence.*

Where the recitals in a deed which is collateral to the purpose of the action are particular and definite and are corroborated by the substantial evidence of the parties and are not contradicted by anything in the record, they may be accepted as true. *Ib.*

8. *Recital of deed. Effect.*

Acts 1007, ch. 334, sec. 1, provides that all conveyances in an official capacity by a public officer, or one acting in a fiduciary relation, shall be admitted as prima facie evidence of the facts recited therein, so far as they relate to the execution of the powers of the office, and section 2 requires all such instruments of record when the act was passed, be admitted in accordance with section 1. *Held*, that recitals, in master's deed to a land belonging to an estate, that decedent left a will which authorized his executor to sell his interest in the land, and that the executor had sold such interest to a person named, to whom the deed purported to convey, the legal

EVIDENCE.

EVIDENCE—Continued.

title, were prima facie evidence of the facts recited. *Camp* v. *Riddle*, 294.

9. *Carriers. Delivery of goods. Bill of lading. Failure to require.*

In an action by the holder of a bill of lading for damages because defendant railroad company surrendered freight without presentation of the bill of lading, evidence *held* to show that such negligence by the railroad company was not the proximate cause of the bank's loss. *Bank* v. *Railroad*, 530.

10. *Trial. Instructions. Burden of proof.*

In a personal injury action, where the court charged that the burden of proof was on plaintiff by reason of defendant's plea of not guilty, the giving of another charge, setting out the contentions of both parties as to the nature of the accident and stating that, if defendant's version was true, verdict should be for it, places the burden of proving the truth of his theory on defendant. *Railroad & Light Co.* v. *Dungey*, 587.

11. *Explosives. Gasoline. Injuries to automobile. Contributory negligence. Burden of proof.*

In an action for injuries from the explosion of plaintiff's automobile by gasoline being poured into the tank coming in contact with a light on the machine, it will be assumed, in the absence of contrary evidence, under the rule as to the burden of proof, that the cap of the tank was removed by plaintiff before he went in to direct the tank to be filled, rather than by defendant's employees who filled it. *Grigsby & Co.* v. *Bratton*, 597.

12. *Explosives. Contributory negligence.*

Plaintiff's son drove plaintiff's automobile to defendant's drug store to have it filled with gasoline, and, after stopping the machine in front of the store and ordering the gasoline, turned down the light of a lamp attached to the rear of the automobile about twenty inches under the cap of the tank into which the gasoline was poured, and walked away to talk to some boys. The side of the lamp next to defendant's store was of metal, so that the light did not show in that direction, and defendant's clerk brought out a five-gallon gasoline can, and, without noticing that the light was burning, placed a funnel into the mouth of the tank and lifted the can to pour gasoline into the tank, when some of the gasoline ran down and came in contact with the light causing an explosion. There was no proof whether the cap of the automobile tank was originally removed by plaintiff's son or by defendant's clerk. *Held*, that plaintiff's son was negligent in merely lowering the light and

removing the tank cap and walking away, without explaining to defendant's clerk that the tank was not ready to be filled. *Ib.*

13. *Criminal Law. Character of accused.*

Where, in a prosecution for murder, accused testified as a witness and introduced evidence as to his good character for truth and veracity as a witness, this was not evidence of, nor did it put in issue, his character for peace or quietness. *Durham* v. *State*, 636.

EXECUTION.

1. *Justices of the Peace. Execution. Entry of stay. Power to modify.*

An attempt made by a justice of the peace, after expiration of the three-day period allowed by law, to change the entry of a stay of execution so as to make it applicable on its face only to the principal judgment debtor was ineffective. *Puckett* v. *Griffith*, 565.

2. *Justices of the Peace. Execution. Entry of stay. Effect as Judgment.*

Entry of a stay of execution by a justice of the peace was equivalent to a confessed judgment against the stayor. *Ib.*

3. *Justices of the Peace. Entry of stay. Operation and effect.*

Where the name of a stayor is entered by a justice of the peace without any qualification, *prima facie* he is stayor for both the principal judgment debtor and his sureties, but he may be shown to be in reality the stayor of the principal only. *Ib.*

FELLOW SERVANT.

1. *Master and Servant. Injuries to servant. Fellow servant.*

A master is not liable to a servant for injuries resulting from the negligence of a fellow servant engaged in the common employment, where there has been due care in the selection and employment of the fellow servant. *Maness* v. *Coal Corporation*, 143.

2. *Master and Servant. Injuries to servant. Negligence of fellow servant.*

Where a servant employed to represent the master in the general supervision of the work departs from the scope of his employment and does the work of a fellow servant, the master is not liable for his negligence when so employed, but if the negli-

gent servant has been designated by the master as one to perform a personal duty, which the master owes to other servants, his negligence in the performance of that duty is the negligence of the master without regard to the general grade of his employment. *Maness v. Coal Corporation*, 143.

3. *Master and Servant. Injuries to servant. Negligence of fellow servant.*

Where a mining company had its carpenter repair a coal chute, which was being used while the repairs were in progress, the master is liable for the negligence of another servant, who had been warning the carpenter before coal was dumped, where he dumped coal down the chute upon the carpenter without warning. *Ib.*

4. *Master and Servant. Master's liability. Noncompliance with rules.*

Deceased, with other machinists, descended in a mining shaft to repair a pump after being warned by the master carpenter, repairing the upper part of the shaft, that they should not come into the shaft until they notified him by knocking on a pipe; but when the repair was finished the foreman said, "Come on," and went into the hoisting basket, followed by deceased, who, as he was getting into the basket, was hit by a piece of timber falling from the carpenters' work and killed. *Held*, that deceased had no right to infer that the foreman had obeyed the rule as to notice, and that, as he himself could have given notice, his failure to observe the rule was negligence, defeating a recovery. *Zinc Co.* v. *Smith*, 447.

FRANCHISES.

1. *Municipal corporations. Legislative control. Grant of franchise.*

The power to grant an exclusive franchise, even of the limited class which may be granted within the city, must be expressly conferred upon the municipality by the legislature. *Noe* v. *Mayor and Aldermen*, 350.

2. *Municipal corporations. Power to grant. Constitutional provisions.*

Under Const., art. 1, sec. 22, forbidding perpetuities, and monopolies, the legislature cannot confer upon a municipality the power to grant an exclusive franchise for the conduct of a business which is of common right. *Ib.*

FRAUDS.

1. *Fraudulent Conveyances. Judgment. Creditor's suit. Issues, proof, and variance.*
In a suit against a purchaser of a stock of goods who failed to comply with the Bulk Sales (Laws 1901, ch. 133), relative to ascertaining and notifying the creditors of the seller, a variance between the bill describing plaintiff as a creditor of a firm of which the seller was a member and the evidence showing that it was an individual creditor of the seller was immaterial; no relief being sought against the partnership, and the partnership having no assets. *Mahoney-Jones* v. *Sams Bros.*, 207.

2. *Fraudulent conveyances. Sales in bulk. Statutory provisions.*
Under the Bulk Sales Law (Laws 1901, ch. 133), providing that, where any portion of a stock of merchandise is sold otherwise than in the ordinary course of trade, the sale shall be presumed fraudulent and void as against creditors of the seller, unless the purchaser shall make inquiry of the seller as to his creditors, and shall notify them personally or by registered mail of the proposed sale, upon a sale of merchandise in bulk by an individual, creditors of a partnership of which he was a member were entitled to notice. *Ib.*

3. *Fraudulent Conveyances. Sales in bulk. Statutory Provisions.*
Under the Bulk Sales Law (Laws 1901, ch. 133), providing that a sale of any portion of a stock of merchandise otherwise than in the ordinary course if trade shall be presumed fraudulent and void as against the creditors of the seller, unless the requirements of that act are complied with, a sale of goods separated from a stock of merchandise to the value of about one-half of the whole stock, without a compliance with the statute, was a violation thereof. *Ib.*

4. *Fraudulent Conveyances. Sales in bulk. Statutory provisions.*
Under such statute, where a purchaser of merchandise in bulk intermingled the goods with other goods, making them practically indistinguishable, he was liable directly to creditors of the seller for their value, without the necessity of attaching them. *Ib.*

5. *Principal and Surety. Fidelity bond. Warehouse superintendent. Fund.*
A corporation operating a grain warehouse, desiring to borrow money from a bank on warehouse receipts, appointed W., who, in fact, was a mere bookkeeper for the corporation, superintendent of the warehouse, and procured a fidelity bond from defendant surety company guaranteeing against loss arising

HOMICIDE.

FRAUDS—Continued.

from W.'s fraud in issuing warehouse receipts without having the grain in store. The bond contained a rider that it should not cover any loss except such as might grow out of the issuing of fraudulent receipts signed by W. in conjunction with an officer of the warehouse company, and only such receipts as should be pledged to complainant bank as collateral in he regular course of its business. *Held*, that, where W. executed receipts in conjunction with the president of the warehouse company, for grain in excess of that stored, which receipts were thereupon pledged to the bank, W. thereby certified to a fact as of his own knowledge, and was guilty of fraud within the rider of the bond, though he had no actual knowledge of the falsity of the receipts, and though he, in fact, was not the superintendent of the warehouse, and performed no duties pertaining to such office. *Grain Co.* v. *Weaver*, 609.

6. *Frauds, Statute of. Sale of real estate. "Party to be charged."* The words "party to be charged," as used in the statute of frauds requiring a memorandum of a sale of real property signed by the party to be charged, means the owner of the realty rather than the party attempting to be charged or held liable in an action based on the memorandum. *Lusky* v. *Keiser*, 705.

7. *Frauds. Statutes of. Selling of land. Written memorandum.* Complainants executed to a broker a contract authorizing the latter to sell a tract of land belonging to one of them, the instrument containing a description of the land, the price and terms, and an agreement to make a deed to any good purchaser complying with the terms procured by the broker. The broker thereafter obtained defendant's consent to purchase, and induced her to sign an addenda on such contract reciting that she accepted the proposition. *Held*, that such contract was merely to define the relation between complainants and the broker, and that it did not constitute a sufficient memorandum of the contract between complainants and defendant to bind her to purchase under the statute of fraud. *Ib.*

HOMICIDE.

1. *Cause of Death. Surgical operation.* One who unlawfully inflicts a dangerous wound upon another is liable for his death, whether it be direct, or occasioned by a surgical operation made necessary by the wound and performed with reasonable skill. *Odeneal* v. *State*, 60.

HOTELS AND BOARDING HOUSES DISTINGUISHED.

HOMICIDE—Continued.

2. *Trial. Direction of verdict.*

In a prosecution for homicide, where accused pleaded not guilty, though he admitted the firing of the fatal shot, claiming that it was caused by his nervousness, and that he was only attempting to rob deceased, it is reversible error for the court to charge that the only question for the jury to determine was whether accused was guilty of murder in the first degree with mitigating circumstances, for Shannon's Code, sec. 6441, declares that the jury before whom an offender is tried shall ascertain whether it is murder in the first or second degree, and if accused confess his guilt, the court shall determine the degree of crime by the verdict of a jury, and the court, not having the power to set aside the verdict of a jury, cannot, as it practically did in this case, direct a verdict of guilty or pass on any question of fact. *Shipp* v. *State*, 499.

HOTELS AND BOARDING HOUSES DISTINGUISHED.

1. *Innkeepers. What constitutes. "Boarding house keeper." "Hotel keeper."*

The words "innkeeper" and "hotel keeper" are synonymous, but each is distinct from a "boarding house keeper," in that the innkeeper has no right to select his guests, but must receive everyone applying for accommodation who conducts himself in a proper manner, etc., while the keeper of a boarding house is one who maintains a house for the accommodation of those who enter under contract for entertainment at a certain rate for a certain period at an agreed compensation; nor does a boarding house cease to be such because transients are occasionally entertained; nor does a hotel lose its character merely because, incidentally, it entertains boarders under contract for compensation for a specified time. *McClaugherty* v. *Cline*, 605.

2. *Innkeepers. Privilege tax. "Boarding house."*

Complainants maintained a public house, kept open at certain assembly grounds, for boarders who attended an assembly, which lasted for eight weeks during the summer. Complainants were paid at a specified sum per week, and, if any boarder left without remaining a full week, he was charged $1.50 per day. Complainants kept no porter, office, or register, and did not solicit business further than by advertising. *Held*, that complainants kept a "boarding house," and not a hotel, and were therefore, not required to pay a privileged tax imposed on hotel keepers by Acts 1909, ch. 479. *Ib.*

HUSBAND AND WIFE—INDICTMENT.

HUSBAND AND WIFE.

1. *Insurance. Insurable Interest.*
   A husband and wife have each a reciprocal insurable interest in the life of the other. *Marquet* v. *Insurance Co.*, 213.
2. *Insurance. Proceeds. Wife's separate estate.*
   Where an insurance policy was made payable to insured's wife, delivered to her, and she paid the premiums thereon, this was a settlement by the husband upon the wife, and created in her a separate estate, and the company therefore properly treated her as having the sole right of disposition of the surplus created by the premiums. *Ib.*
3. *Insurance. Insurable Interest. Effect of divorce.*
   A life insurance contract naming insured's wife as beneficiary, was not invalidated by the subsequent divorce of the husband and wife. *Ib.*
4. *Evidence. Documentary evidence. Recitals in deeds. Effect. Collateral issue.*
   In ejectment between the heirs of a wife who conveyed property to her husband and the husband's grantees, the deed from the wife is collateral to the purpose of the action, and the recitals therein are only prima facie evidence of the facts recited, but they are evidence and receivable as such against all those claiming under the deed. *Ferguson* v. *Booth*, 259.
5. *Wife's separate estate. Conveyance to wife. Husband's request.*
   The rule that, where a stranger makes a conveyance to a wife, there must be apt words used to create a separate estate in the wife does not apply where the husband pays the consideration for the property and directs the conveyance to be made to the wife, in which case the rule is the same as if the conveyance were directly from the husband and the wife takes a separate estate which she may convey to her husband under Shannon's Code, sec. 4246. *Ib.*

INDICTMENT.

1. *Homicide. Instructions. Degrees of crime.*
   It is better practice to charge upon all of the offenses embraced in the indictment, since failure to do so will be reversible if there is any doubt that accused was prejudiced by such omission. *Jones* v. *State*, 493.
2. *Information. Value. Larceny.*
   That an indictment for larceny, in its statement of the value of the property, omitted the dollar sign and contained an elongated decimal point extending under the two naughts did not render it fatally defective. *State* v. *Wainwright*, 544.

INJUNCTION.

1. *Eminent Domain. Appropriation of land. Exclusive remedies.*
Where land has been occupied by a public service corporation, which did not exercise its power of eminent domain, the remedy given the landowner by Shannon's Code, sec. 1865, to petition for a jury of inquest to assess the damages, or to bring an action at law for damages, is exclusive, and the landowner cannot bring ejectment or enjoin the corporation from using his land. *Railroad* v. *Transportation Co.*, 277.

2. *Right to maintain injunction.*
Even though a flume company was not authorized by law to appropriate water to run its flume, a riparian owner, who stood by and without objection allowed it to erect a valuable flume, which would be worthless without the water from his stream, cannot then enjoin such appropriation of water, for the granting of an injunction is always a matter of discretion, and the court should refuse one when it will destroy valuable property of one party without any corresponding benefit to another. *Ib.*

3. *Denial. Recovery of damages.*
Where a riparian owner sought to enjoin a flume company from operating its flume, which it had placed through his land, without condemnation, and from appropriating the waters of a stream which ran through his property, and also damages, but alleged no ground of equitable jurisdiction save the right to injunctive relief, the denial of his injunction precludes the court of chancery from taking jurisdiction of his suit for damages. *Ib.*

4. *Right to maintain.*
That a flume company organized as a public service corporation will not transport for the public generally is no ground for an injunction in favor of one whose land abutted on the stream which fed the flume and whose property had been taken without condemnation; the persons injured by the refusal of the company having their right of redress in appropriate proceedings, and the State having the right to dissolve the company for a breach of public duty. *Ib.*

5. *Contempt.*
Where a temporary injunction issued to restrain a railroad company from condemning a right of way immediately in front of complainant's residence was dismissed on stipulation, which provided that both parties should apply for a dismissal, and that the road should be constructed in a certain manner, and the trains operated at less than a certain rate of speed, the

INSTRUCTIONS.

INJUNCTION—Continued.

officers of the railroad company cannot be proceeded against as for contempt for violation of the injunction because they operated the trains at a greater rate of speed. *Caldwell* v. *Railroad*, 697.

INSTRUCTIONS.

1. *Criminal Law. Reasonable doubt. "Moral certainty."*
   An instruction which correctly defines a reasonable doubt, and then states that, in order to convict, it is not required that the guilt of the defendant be established to an absolute certainty, but to a "moral certainty," that is, one which convinces and directs the understanding, and satisfies the reason and judgment of the truth of the charge, is not erroneous. *Odeneal* v. *State*, 60.
2. *Criminal law. Alibi.*
   While it is better to treat an alibi as a point of evidence, and not as a defense, an instruction that the defense of alibi, when clearly and fully established by the proof, is a perfect defense, but that the jury should consider the proof with strictness and caution, as it is easily concocted, is not erroneous, where it also states that if, weighing the proof of the alibi impartially in connection with all the circumstances in the case, the jury have a reasonable doubt as to the defendant's presence at the place of the crime, they should acquit him; any impropriety in the use of the words "when clearly and fully established by the proof," as requiring proof beyond a reasonable doubt, being sufficiently corrected by the rest of the instructions, so as not to mislead the jury. *Ib.*
3. *Trials. Taking case from jury. Direction of verdict. Consideration of evidence.*
   In passing on a motion by defendant for a peremptory instruction in his favor, it must be assumed that the evidence of plaintiff's witnesses is true. *Mayor and Aldermen* v. *Cain*, 250.
4. *Negligence. Contributory negligence. Question for jury.*
   Where the evidence shows without contradiction that plaintiff's negligence proximately contributed to his injury, the case is one for a peremptory instruction for the defendant. *Ib.*
5. *Homicide. Issues. Second degree murder.*
   In view of Shannon's Code, sec. 6441, requiring the jury to ascertain in their verdict whether the offense is murder in the first or second degree, it was error, on trial of an indictment for

murder, for the court not to instruct on second degree murder. *Jones* v. *State*, 493.

6. *Homicide. Degrees of crime.*
It is better practice to charge upon all of the offenses embraced in the indictment, since failure to do so will be reversible if there is any doubt that accused was prejudiced by such omission. *Ib.*

7. *Homicide. Appeal. Harmless error. Failure to instruct.*
Failure to instruct on second degree murder so that the jury could ascertain in its verdict whether the offense was first or second degree murder, pursuant to Shannon's Code, sec. 6441, was reversible error, notwithstanding Pub. Acts 1911, ch. 32; providing that no judgment shall be set aside for error in the charge, etc., unless it affirmatively appears that it affected the result. *Ib.*

8. *Trial. Burden of proof.*
In a personal injury action, where the court charged that the burden of proof was on plaintiff by reason of defendant's plea of not guilty, the giving of another charge, setting out the contentions of both parties as to the nature of the accident and stating that, if defendant's version was true, verdict should be for it, places the burden of proving the truth of his theory on defendant. *Railway & Light Co.* v. *Dungey*, 587.

9. *Trial. Burden of proof.*
In a personal injury action, a charge, which set out the contentions of both of the parties and stated that if defendant's version was true, verdict should be for it, is improper because imposing on defendant the burden of proving its defense beyond reasonable doubt. *Ib.*

10. *Appeal and Error. Review. Harmless error.*
Notwithstanding the provisions of Acts 1911, ch. 32, providing that no judgment shall be set aside for any error not affecting the result of the trial, the giving of an instruction, in a personal injury action against a street railway company, outlining defendant's theory of the accident and charging the jury that if they should find it to be true to find for defendant, is so prejudicial as to necessitate a reversal, particularly where other instructions authorized a finding for plaintiff on a slight preponderance of evidence and the statute declaring defendant's liability for its negligence was read to the jury, without qulification. *Ib.*

INSURANCE.

INSTRUCTIONS—Continued.

11. *Criminal Law. Character of accused.*

Where, in a prosecution for murder, accused did not introduce evidence as to his good character for peace and quietness, the court properly overruled his request to charge that there was a presumption of his good character which stood as a witness for him, and should be looked to by the jury as having effect upon reasonable doubt of his guilt, since, though there was a presumption of his good character in the sense that, in the absence of proof, the jury was not warranted in assuming that he was of bad character, it was not such a presumption as could be made the basis of inference to strengthen his presumption of innocence and thereby the resultant—reasonable doubt. *Durham* v. *State*, 636.

INSURANCE.

1. *Fire Insurance. Contracts by foreign insurance companies. Validity.*

Under Shannon's Code, secs. 3274-3369, making it unlawful for any insurance company to make a contract of insurance, except as authorized by law, and prescribing the terms on which foreign insurance companies may be authorized to do business in the state, and making any person soliciting insurance on behalf of a foreign insurance company not complying with the law guilty of a misdemeanor, and authorizing licensed insurance brokers to place insurance with foreign companies, a contract of insurance made by a foreign insurance company not authorized to do business in the state, through an agent not an insurance broker, is unlawful. *Woolwine* v. *Mason*, 35.

2. *Fidelity insurance. Embezzlement. Acts constituting.*

Where a general agent of an insurance company, authorized to appoint local agents, who reported to him the insurance effected by them and the amount of premiums, and remitted to him the premiums, he himself being required to report daily to the company the amount of premiums, and to make a monthly report showing balances due, which must be paid within 60 days, was permitted to deposit in his own name premiums collected and received from local agents without any objection from the company, which knew the facts and also that the general agent was the general agent of other insurance companies, and that he kept the funds of all the companies in his individual account in the banks, and checked on them all to meet the needs of his business,

INSURANCE.

INSURANCE—Continued.

the agent, failing to account for premiums collected and deposited, was not guilty of embezzlement of the funds of the company, within a bond conditioned to reimburse the company for losses by embezzlement. *Insurance Co.* v. *Nelson*, 70.

3. *Insurable interest. Date of termination.*

Where a life insurance policy for a term of ten years provided that at the expiration of the term a new policy for an equal amount would be issued without medical re-examination, subject to the premium for the age then attained by insured, providing the expiring policy was returned to the company, and that the surplus under the expiring policy would be applied to reduce the premium on the new policy to the rate charged in the first policy, a rider attached to the policy at the expiration of the term, providing that, the surplus having been found sufficient to reduce the premium during the ensuing term of ten years to the amount named as premium in the policy, it was unnecessary to return the policy for the issue of a new policy until the expiration of ten years from the date of the rider, provided the premium was paid and that all the other conditions, provisions, and requirements of the policy continued in force, extended the obligations of the company for an additional ten-year term, and made the original policy operative for twenty instead of ten years, and therefore the beneficiary's insurable interest was to be tested as of the date of the original contract and not as of the date of the rider. *Marquet* v. *Insurance Co.*, 213.

4. *Insurable interest. Husband and wife.*

A husband and wife have each a reciprocal insurable interest in the life of the other. *Ib.*

5. *Construction. Rights of beneficiaries.*

Where a life insurance policy was made payable to insured's wife, or in the event of her death before that of insured to his heirs, executors, administrators, or assigns, her rights were so far vested that they could not, during her life, be divested without her consent. *Ib.*

6. *Proceeds. Wife's separate estate.*

Where an insurance policy was made payable to insured's wife, delivered to her, and she paid the premiums thereon, this was a settlement by the husband upon the wife, and created in her separate estate, and the company therefore properly treated her as having the sole right of disposition of the surplus created by the premiums. *Ib.*

INTERSTATE COMMERCE.

INSURANCE—Continued.

7. *Insurable interest. Necessity.*

A lack of insurable interest by the beneficiary in the life of the insured, where the insurance is taken out and paid for by the beneficiary as a speculation, vitiates the contract, especially in view of Acts, 1895, ch. 160, sec. 2, as amended by Acts 1899, ch. 31, defining a contract of insurance as an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the insured upon the destruction or injury, loss or damage, of something in which the other party had an insurable interest, and Shannon's Code, sec. 3159, providing that all contracts founded in whole or in part on a gambling or wagering consideration shall be void to the extent of such consideration. *Marquet v. Insurance Co.*, 213.

8. *Insurable interest. Husband and wife. Effect of divorce.*

A life insurance contract naming insured's wife as beneficiary, was not invalidated by the subsequent divorce of the husband and wife. *Ib.*

9. *Losses. Demand and refusal. Penalty. Time of action.*

Under Acts 1901, ch. 141, declaring an insurance company, when a loss occurs, and it refuses to pay it within sixty days after demand, liable to pay the policy holder a penalty in addition to the loss, suit must be delayed sixty days after demand only when the company does not answer the demand within that time, and, the refusal being sooner, suit may be commenced immediately thereafter. *Thompson* v. *Life & Accident Co.*, 526.

10. *Losses. Demand and refusal. Penalty.*

Where, on refusal to pay an indemnity under an accident and sick benefit policy, bill therefor and for the penalty provided by Acts 1901, ch. 141, was filed, and, additional losses thereafter accruing, amended and supplemental bills to recover them were filed, more than sixty days having elapsed before their filing, the filing of the bill was a sufficient demand, and the filing of the answers, denying liability, a refusal to pay, as regards right to recover penalty on the additional losses. *Ib.*

INTERSTATE COMMERCE.

1. *Commerce.*

"Commerce" among the States consists of intercourse and traffic, including the transportation of persons and property as well as the purchase and exchange of commodities. *Amusement Co.* v. *Albert*, 417.

JUDGMENTS AND DECREES.

INTERSTATE COMMERCE—Continued.

2. *Corporations. Foreign corporations. Licensing of foreign corporations.*

A foreign corporation doing business in the State under foreign corporation statutes (Acts 1877, ch. 31; Acts 1891, ch. 122; Acts 1895, ch. 81), requiring the filing of the charter with the secretary of State and the procurement of a license, is not a new entity, distinct from the foreign organization, and is domestic only as to property and acts within the jurisdiction. *Adams* v. *Chattanooga Co.*, 505.

JUDGMENTS AND DECREES.

1. *Release. Joint tort-feasors. "Covenant not to sue" one joint wrongdoer. Effect.*

An instrument executed by a person sustaining a personal injury inflicted by joint wrongdoers, whereby he agrees to dismiss the suit against one of them, and not to reinstitute it, and whereby he agrees to hold him harmless from all liability by reason of the accident, is a "covenant not to sue," and is not a satisfaction of the liability of the other wrongdoer, and judgment may be recovered against him. *Smith* v. *Amusement Co.*, 112.

2. *Evidence. Circumstantial evidence. Weight and sufficiency.*

Proof of an essential fact must be had either direct or positive by witnesses who know the fact, or circumstantial by witnesses who know and testify to facts which tend to establish or prove the essential fact, and only when the circumstances are, in the judgment of the court or jury, such as usually or necessarily attend the essential fact are they sufficient in law to warrant a verdict; judgment or decree establishing a fact which has not been proved by direct or positive evidence. *Marquet* v. *Insurance Co.*, 213.

3. *Appeal and error. Assignments of error. Necessity.*

In an action against an employer and two of its employees for false imprisonment, assault and slander, in which a verdict was rendered against the employer and in favor of the employees, where it appeared that other employees not sued assisted in inflicting the injuries complained of, the supreme court could not, in the absence of an assignment of error that there was no evidence to support the verdict against the employer, examine the evidence for the purpose of determining whether there was evidence sustaining the employer's liability, aside from the evidence as to the conduct of the employees

JURIES AND JURORS.

JUDGMENTS AND DECREES—Continued.

exonerated by the verdict, and hence would affirm the judgment. *Loveman Co.* v. *Bayless*, 307.

4. *Judgment. Bill to set aside. Laches.*

Where it appeared that the complainant, in a suit to set aside, for fraud in procurement, the entry of his name as stayor of a judgment rendered by a justice of the peace, made no effort to ascertain from the sureties of the principal debtor whether they desired him to become stayor, and that the sureties promptly disaffirmed the stay, complainant, by reason of his inattention, was not entitled to have the judgment set aside. *Puckett* v. *Griffith*, 565.

5. *Appeal and error. Joint judgment. Partial invalidity.*

Where, in an action for death against a lumber company and its superintendent, a joint judgment against both was not sustainable as against the superintendent, but was valid as against the lumber company, the latter was not entitled to have it set aside as to it. *Lumber Co.* v. *Sessler*, 665.

6. *Trusts. Proceedings for reinvestment. Necessary parties.*

A decree providing for the sale of trust property is not invalid because the ultimate contingent remaindermen were not parties to the proceeding; such persons being represented by the life tenant and those then claiming the vested remainder. *Realty Co.* v. *Andrews*, 725.

7. *Trusts. Sale of trust property for reinvestment. Title of purchaser.*

In view of Shannon's Code, sec. 5085, providing that the purchasers of property judicially sold for reinvestment shall take good title if the provisions of the law have been substantially complied with, notwithstanding the errors of the court, a decree providing for the sale of trust property passes good title to the purchaser, who paid his money into court, even though it did not sufficiently protect the interests of contingent remaindermen, for while the proceeds of such sale must, under section 5087, be reinvested for the benefit of the parties interested, the purchaser is not charged with any trust to see to the reinvestment. *Ib.*

JURIES AND JURORS.

Jury. Competency. Opinion concerning the law. "Good and lawful man."

In a prosecution for the sale of intoxicating liquor outside a city within four miles of a school, a venireman who stated that

he was in favor of enforcing the law outside of the city, but thought saloons should be permitted to run in the city, was not qualified as a "good and lawful man" to sit upon the jury, within the meaning of the law governing the selection of juries, as found in Shannon's Code, secs. 5801, 5804, 5810, 5818, since he believes in partiality in the enforcement of the laws. *Turner* v. *State*, 27.

JURISDICTION.

1. *Courts. Appellate jurisdiction. Transfers. Statutory provisions.*

Acts 1909, ch. 192, providing that, when cases are appealed to the supreme court which rightly belong to the court of civil appeals, the supreme court shall transfer the case to the court of civil appeals, and *vice versa*, enacted to abolish the practice under which the courts dismissed for want of jurisdiction cases brought to the wrong court, covers all cases brought to either of the courts, whether by appeal or error; and where a case is brought to the supreme court by writ of error, which rightly belongs to the court of civil appeals, the supreme court will transfer the case to the court of civil appeals. *Bank & Trust Co.* v. *Walker*, 22.

2. *Jury. Waiver. Effect as to punishment.*

Under Const., art. 6, sec. 14, providing that no fine shall be laid on any citizen exceeding $50, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than $50, a person indicted for selling intoxicating liquors within four miles of a schoolhouse under Acts 1909, ch. 1, fixing the punishment therefor at a fine of not less than $50 nor more than $500, who waived a jury trial, could not be sentenced by the trial judge to pay a fine of more than $50, since the constitution has conferred upon juries exclusive jurisdiction to levy a fine exceeding that amount, and such jurisdiction cannot be conferred upon any other tribunal by consent or waiver of the parties. *Metzner* v. *State*, 45.

3. *Equity. Jurisdiction of court of chancery. "All civil causes of action."*

Under Shannon's Code, sec. 6109, extending the jurisdiction of the chancery court to all civil causes of action triable in the circuit court, except for injuries to person, property, or character involving unliquidated damages, the words "all civil

causes of action" mean only those civil actions which could have originated in the circuit court; the purpose of the act being to give litigants the option of bringing suits either in the circuit or the chancery court. *Swift & Co.* v. *Warehouse Co.*, 82.

4. *Equity. Jurisdiction of court of chancery.*

Shannon's Code, sec. 6109, giving the court of chancery jurisdiction of all civil causes of action heretofore triable in the circuit court, does not give the court of chancery exclusive, but merely concurrent, jurisdiction of such actions. *Ib.*

5. *Equity. Jurisdiction of court of chancery. "Liquidated damages."*

Under Shannon's Code, sec. 6109, extending the jurisdiction of the court of chancery to all civil causes of action, except for injuries to person, property, or character involving unliquidated damages, an action for damages for injuries to eggs caused by the negligence of the warehouseman in allowing them to absorb fruity flavors cannot be maintained in the court of chancery, for not only is the action based on an injury to property, but the damages are unliquidated; the contract of bailment not fixing the amount, and "liquidated damages" being the amount of damages which have been fixed by anticipatory agreement between the parties (citing 5 Words and Phrases, 4174). *Ib.*

6. *Equity. Statutory provisions. Repeal by implication.*

Acts 1851-52, ch. 365, sec. 9, which was carried into Shannon's Code as section 6131, provides that the filing of an answer is a waiver of objection to the jurisdiction of the court of chancery and the cause will not be dismissed, but will be determined on its merits, although the court be of the opinion that the matters complained of are of legal cognizance. Acts 1877, ch. 97, carried into Shannon's Code as section 6109, provides that the court of chancery shall have jurisdiction of all actions triable in the circuit court, except actions for injuries to person, property, or character involving unliquidated damages. *Held*, that the act of 1851, in so far as it applied to the exceptions in the act of 1877, was repealed by implication, although it remained in force as to objections to jurisdiction over the person of the defendant or the local *status* of the litigation, and consequently the filing of an answer by the defendant is not a waiver of objections to jurisdiction, where the action is one falling within the exceptions of the statute. *Ib.*

JURISDICTION.

JURISDICTION—Continued.

7. *Courts. Equity. Consent. Waiver.*
"Jurisdiction" is the power constitutionally conferred upon a judge or magistrate to determine causes according to law and carry his sentence into execution; hence as the act of 1877 (Shannon's Code, sec. §109), specifically excepts certain causes from the jurisdiction of court of chancery, a party cannot, even by express waiver or consent, confer upon that tribunal jurisdiction to hear the excepted causes. *Ib.*

8. *Courts. Appellate jurisdiction. Ejectment.*
Where a bill charged that complainant was the owner of land and entitled to its possession, and that defendant entered thereon and was claiming it under a pretended title, appropriating rents and profits, and prayed for adjudication of the title and for possession and rents, and the answer admitted possession, but denied complainant's title and right of possession, and set up defendant's own claim of title, and an amended bill reiterated complainant's claim, and attacked defendant's claim and sought to remove it as a cloud, the original bill made a case of ejectment of which the court of civil appeals has no jurisdiction under acts 1907, ch. 82, sec. 7; the relief sought in the amended bill being merely incidental thereto, and not devolving jurisdiction on that court. *Reeves* v. *Haynie*, 717.

9. *Contempt. Jurisdiction of proceedings.*
The dual nature of a contempt proceeding as both civil and criminal does not prevent its prosecution in any court wherein a contempt occurs, though it be a court of purely civil jurisdiction. *Graham* v. *Williamson*, 720.

10. *Contempt. Power to punish.*
The power to punish for contempt is inherent in all courts to enable them to accomplish the purposes for which they were designed, and, while it may be regulated by the legislature, it is not conferred. *Ib.*

11. *Contempt. Appellate jurisdiction.*
Contempt proceedings for failure to obey a preliminary injunction are merely an incident to the power of the chancery court in the main controversy, and hence jurisdiction on appeal from the decision in that controversy controls such jurisdiction in the contempt proceedings, and hence, where the main controversy, under Acts 1907, ch. 82, belongs to the court of civil appeals, the contempt proceeding likewise belongs to it. *Ib.*

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JUSTICE OF THE PEACE—LIABILITY.

JUSTICE OF THE PEACE.

Execution. Stay. Liability of stayor.

Under Shannon's Code, sec. 4788, authorizing a justice of the peace to enter security for stay of execution, and section 4789 providing that one who becomes stayor at the instance of the principal defendant is liable before a surety, a person who caused his name to be entered broadly as stayor was liable before the sureties, where the stay as to them was unauthorized and promptly disaffirmed by them, though he was induced to become stayor by the principal debtor's false representation that the sureties desired that the judgment be stayed. *Puckett* v. *Griffith*, 565.

LACHES.

Where it appeared that the complainant, in a suit to set aside, for fraud in procurement, the entry of his name as stayor of a judgment rendered by a justice of the peace, made no effort to ascertain from the sureties of the principal debtor whether they desired him to become stayor, and that the sureties promptly disaffirmed the stay, complainant, by reason of his inattention, was not entitled to have the judgment set aside. *Puckett* v. *Griffith*, 565.

LAWS 1897.

Prisons. Care of prisoners. Sheriff's fees. Liability of county. Boarding. *State, ex rel.*, v. *Drummond*, 271.

LAWS 1901.

Fraudulent conveyances. Judgment. Creditor's suit. Issues, proof and variance. Fraudulent conveyances. Sales in bulk. Statutory provisions. *Mahoney-Jones Co.* v. *Sams Bros.*, 207.

LEGISLATIVE AUTHORITY.

See CONSTITUTIONAL LAW.

LIABILITY.

1. *Insurance. Fire Insurance. Unlawful contracts. Liability of agent.*

Under Shannon's Code, sec. 3316, making an agent personally liable on all contracts of insurance unlawfully made by him in behalf of any insurance company not authorized to do business in the State, an agent not a licensed insurance broker,

LIABILITY.

LIABILITY—Continued.

who procures through another agent in a sister State insurance contracts from foreign insurance companies not authorized to do business in the State, is liable to the amount of the policies so obtained, though insured knew of the violation of the law. *Woolwine* v. *Mason*, 35.

2. *Carriers. Carriage of goods. Connecting carriers. Delivery.*
Where goods, shipped over the roads of two connecting carriers under a bill of lading providing that the legal remedy for loss or damage should be only against the particular carrier in whose custody they actually were. were destroyed by fire after they had been placed upon a spur track at the junction point, and after waybills had been delivered to the common agents of the carrier at that point, who had made the clerical entries showing the exchange, but the cars containing the shipment had not yet been inspected and accepted by the connecting carrier in accordance with its custom, there was no actual completed delivery to the connecting carrier, and the first carrier is liable for the loss. *Farnsworth-Evans Co.* v. *Railroad*, 50.

3. *Partnership. Liability for firm debts.*
Partnership debts are several as well as joint, and each member of the firm is individually liable therefor, especially in view of Shannon's Code, sec. 4486, providing that all joint obligations and promises are joint and several. *Mahoney-Jones Co.* v. *Sams Bros.*, 207.

4. *Trial. Joint defendants. Verdict for servant. Effect as to master.*
When a master is sued solely for misfeasance or nonfeasance on the part of his servants and is liable for their conduct only under the doctrine of *respondeat superior*, a verdict, permitted to stand in favor of such servants, either in the same action or in a prior action, entitles the master to a discharge from such claimed liability. *Loveman Co.* v. *Bayless*, 307.

5. *Trial. Verdict for servant. Effect as to master.*
Where a master is liable for an injury to a third person on grounds other than the misconduct of his servant, he may be held liable notwithstanding a verdict in favor of the servant. *Ib.*

6. *Municipal corporations. Acceptance of streets.*
If a strip, offered to be dedicated as a street, contains thereon a nuisance, such as a dangerous pond, slight acts of acceptance by the municipality would be sufficient to show an acceptance

so as to make it liable for injuries arising from the pond. *Doyle* v. *Chattanooga*, 433.

7. *Municipal corporations. Defective streets.*

A city was responsible for the death of boys eleven and nine years of age by drowning in a pond which occupied the whole width of a public street, about 120 feet from a public park, in analogy to the rule imposing liability for maintaining an attractive nuisance. *Ib.*

8. *Principal and surety. Fidelity bond. Extent of liability.*

Where a bond secured plaintiff bank against the issuance of fraudulent warehouse receipts by the superintendent of a warehouse in so far as such receipts might be pledged by the warehouse company to the bank, and receipts issued by the superintendent for an amount of grain in excess of that deposited were pledged to the bank, the surety's liability on the bond was the difference between the value of the grain called for by the receipts and the value of the amount actually stored under each of them at the time they were issued. *Grain Co.* v. *Weaver*, 609.

9. *Principal and surety. Fidelity bond. Warehouse receipts. Pledge.*

Where a warehouseman's superintendent was bonded to secure a bank against fraudulent warehouse receipts that might be pledged to it to secure loans to the warehouse company, and fraudulent receipts were issued for more grain than was deposited under them, which receipts were pledged to the bank, it was not material, either to the surety's liability, or to the bank's right to recover under the bond, that the warehouse company, after pledging the receipts, disposed of all of the grain covered thereby. *Ib.*

10. *Master and servant. Injuries to third person. Death. Master's liability.*

Defendant lumber company maintained a sawmill in connection with which was a chute by which wood for fuel converted from slabs was taken from the saw. The wood was sold to draymen who loaded their wagons from the pile, for the protection of whom the lumber company had adopted a custom of requiring the employees who took out the large pieces to give a warning signal if by chance a large piece should go past him into the chute, and be liable to fall on the pile. While decedent, a customer, was loading his wagon at the pile, the employee in charge of the chute temporarily left it to warm himself, and, while absent, a large piece of wood passed over

LIMITATION OF ACTIONS.

LIABILITY—Continued.

the chute without warning, and struck decedent, and caused injuries from which he died. *Held*, that decedent, being at the pile by the lumber company's invitation, was entitled to rely on the giving of a warning signal, and that defendant was therefore liable for his death resulting from a failure on the part of the employee to comply with the custom. *Lumber Co.* v. *Sessler*, 665.

11. *Master and servant. Injuries to third person. Superintendent.* Where the superintendent of a lumber company had no personal interest in the business, and was not present when decedent, a customer, was struck and killed through the negligence of a laborer employed by the company, and there was no claim that the superintendent was negligent in employing such laborer or retaining him in the service. the superintendent was not liable. *Ib.*

12. *Master and servant. Assumption of risk. Simple tools. Ladder.* An ordinary ladder falls within the class of simple tools for defects in which the employer is held not liable, on the ground that such defect must be obvious to the user, by whom any risk of danger therefrom is assumed; and the equipment of the ladder with metal spikes at the bottom does not take it out of such rule. *Sivley* v. *Drill Co.*, 675.

13. *Master and servants. Master's liability. Tools and appliances.* Where plaintiff, engaged in oiling overhead shafts and pulleys, before ascending a ladder, the lower end of which was equipped with metal spikes to prevent sliding, but which had worn blunt and become defective, requested his foreman to have some one hold it, but was told to go ahead and use it, that it had been used for three years and had never fallen, there was no order predicated upon such a condition of the ladder, or upon any inspection, upon which plaintiff could have relief. *Ib.*

LIMITATION OF ACTIONS.

New action after reversal.

Under Shannon's Code, sec. 4446, providing that if an action is commenced within the time limited, and judgment is rendered against the plaintiff upon any ground not concluding his right of action, or is reversed on appeal, he may commence a new action within one year, defendant, who secured a reversal because the action was improperly brought in the court of chancery, will be enjoined by the decree of reversal from

LIBEL AND SLANDER—LIENS.

LIMITATION OF ACTIONS—Continued.

setting up the defense of limitations against a new action begun within the year. *Swift & Co.* v. *Warehouse Co.*, 82.

LIBEL AND SLANDER.

1. *Abatement and revival. Survival of causes of action. Libel.*
An action may be maintained against an executor as such for damages from a libel contained in a will published by the probate thereof, the maxim, "*Actio personalis moritur cum persona*" not applying, since the right of action did not exist in the lifetime of the testator. *Harris* v. *Trust Co.*, 573.
2. *Libelous words. Charge of illegitimacy.*
It is libelous *per se* to charge one in print or writing with being illegitimate. *Ib.*
3. *Executors and administrators. Actions.*
Where a libel contained in a will was published by the probate thereof, the testator, and not the executor, was liable, since a principal is responsible where authority is given to an agent to publish libelous words, and the publication is made in substantial accord with such authority and the publication by the executor was in literal pursuance of the authority given; it being his duty to probate the will. *Ib.*

LIENS.

1. *Innkeepers.*
At common law innkeepers had a lien upon baggage brought upon the premises by guests, whether it belonged to the guests or to third persons; but such lien did not exist in favor of boarding house keepers. *Nance* v. *Piano Co.*, 1.
2. *Livery stable keepers.*
At common law a livery stable keeper did not have a lien such as that given to innkeepers. *Ib.*
3. *Innkeepers. Eminent domain. Liens by boarding house keepers. Validity of statute.*
Shannon's Code, sec. 3590, giving the keepers of boarding and lodging houses a lien on all baggage and other goods, brought into such house by any guest, to secure payment of sums due for board or lodging, is valid, and does not violate Const. Tenn., art. 1, sec. 21, prohibiting property from being taken without just compensation. *Ib.*
4. *Sales. Conditional sales.*
A conditional vendor only has a lien as security for the purchase money by the retention of title, and does not own the property absolutely. *Ib.*

MASTER AND SERVANT.

LIENS—Continued.

5. *Mechanics' liens. Time for filing notice. Completion of building.*

Under a contract for construction of a building, including the installing of a sprinkler system, to be approved by the State Inspection Bureau, the building is not completed, as regards the thirty days thereafter for filing notice of lien, till the work required by the bureau on its inspection is done. *Harrison* v. *Knafle*, 329.

6. *Bankruptcy. Priorities.*

Relative to the question of certain creditors of a bankrupt contractor being entitled to priority as having filed notices of lien within thirty days of completion of a building, the bankrupt's trustee is bound by the agreement of the contractor and building owner in extending time for the completion. *Ib.*

7. *Mechanics' liens. Time for filing notice. Enlargement of contract.*

Within the statute giving materialmen thirty days from completion of the work provided by the contract within which to file notice of liens, they have thirty days from completion of the work as enlarged by amendment of the contract between the owner and contractor, though part of their material was furnished before such amendment and all of it was for the work previously provided for by the contract. *Ib.*

MASTER AND SERVANT.

1. *Injuries to servant. Actions. Jury question.*

In a personal injury action, evidence *held* sufficient to show that the servant at the head house of defendant's mine was acting within the scope of his authority and about the business of the master, when he dumped coal into the chute and upon plaintiff. *Maness* v. *Coal Corporation*, 143.

2. *Injuries to servant. Fellow servant.*

A master is not liable to a servant for injuries resulting from the negligence of a fellow servant engaged in the common employment, where there has been due care in the selection and employment of the fellow-servant. *Ib.*

3. *Injuries to servant. Negligence of fellow servant.*

Where a servant employed to represent the master in the general supervision of the work departs from the scope of his employment and does the work of a fellow servant, the master is not liable for his negligence when so employed, but if the negligent servant has been designated by the master as one to perform a personal duty, which the master owes to other serv-

MASTER AND SERVANT.

MASTER AND SERVANT—Continued.

ants, his negligence in the performance of that duty is the negligence of the master without regard to the general grade of his employment. *Maness v. Coal Corporation*, 143.

4. *Injuries to servant. Duty to warn.*
Where a mining company, employed a carpenter to repair a coal chute, down which coal was dumped while the carpenter was at work, it is the duty of the company to warn the carpenter before coal is dumped into the chute. *Ib.*

5. *Injuries to servant. Negligence of fellow servant.*
Where a mining company had its carpenter repair a coal chute, which was being used while the repairs were in progress, the master is liable for the negligence of another servant, who had been warning the carpenter before coal was dumped, where he dumped coal down the chute upon the carpenter without warning. *Ib.*

6. *Trial. Joint defendants. Verdict for servant. Effect as to master.*
When a master is sued solely for misfeasance or nonfeasance on the part of his servants and is liable for their conduct only under the doctrine of *respondeat superior*, a verdict, permitted to stand in favor of such servants, either in the same action or in a prior action, entitles the master to a discharge from such claimed liability. *Loveman Co.* v. *Bayless*, 307.

7. *Trial. Verdict for servant. Effect as to master.*
Where a master is liable for an injury to a third person on grounds other than the misconduct of his servant, he may be held liable notwithstanding a verdict in favor of the servant. *Ib.*

8. *Master's liability. Servant's duty to obey rule. "Nondelegable."*
While in instances the giving of signals may be the nondelegable duty of the master, the term "nondelegable" does not mean that the master may not impose upon a servant the duty of giving signals prescribed for his own safety, and where such signals are not given at such a place as his duty requires he cannot recover for injury resulting therefrom. *Zinc Co.* v. *Smith*, 447.

9. *Injuries to third person. Death. Master's liability.*
Defendant lumber company maintained a sawmill in connection with hich was a chute by which wood for fuel converted from slabs was taken from the saw. The wood was sold to draymen who loaded their wagons from the pile, for the protection of whom the lumber company had adopted a custom of requiring the employees who took out the large pieces to give a

MORTGAGES.

MASTER AND SERVANT—Continued.

warning signal if by chance a large piece should go past him into the chute, and be liable to fall on the pile. While decedent, a customer, was loading his wagon at the pile, the employee in charge of the chute temporarily left it to warm himself, and, while absent, a large piece of wood passed over the chute without warning, and struck decedent, and caused injuries from which he died. *Held*, that decedent, being at the pile by the lumber company's invitation, was entitled to rely on the giving of a warning signal, and that defendant was therefore liable for his death resulting from a failure on the part of the employee to comply with the custom. *Lumber Co.* v. *Sessler*, 665.

10. *Assumption of risk. Simple tools. Ladder.*

An ordinary ladder falls within the claiss of simple tools for defects in which the employer is held not liable, on the ground that such defect must be obvious to the user, by whom any risk of danger therefrom is assumed; and the equipment of the ladder with metal spikes at the bottom does not take it out of such rule. *Sivley* v. *Drill Co.*, 675.

11. *Master's liability. Tools and appliances.*

Where plaintiff, engaged in oiling overhead shafts and pulleys, before ascending a ladder, the lower end of which was equipped, with metal spikes to prevent sliding, but which had worn blunt and become defective, requested his foreman to have some one hold it, but was told to go ahead and use it, that it had been used for three years and had never fallen, there was no order predicated upon such a condition of the ladder, or upon any inspection, upon which plaintiff could have relief. *Ib.*

MORTGAGES.

1. *Chattel. Foreign.*

Though a mortgagee of property under a foreign mortgage, duly recorded and valid in the foreign jurisdiction, can recover the property from a purchaser without knowledge in this State, yet, where cotton covered by a mortgage duly recorded in a foreign State was consigned, without the knowledge or consent of the mortgagee, to a cotton factor in this State, the mortgagee could not recover from the factor, after he had in good faith sold the property and turned over the proceeds to his principal, since the contest was not over the property or proceeds. *Fargason* v. *Ball*, 137.

MUNICIPAL CORPORATIONS.

MORTGAGES—Continued.

2. *Payment. Sufficiency of tender.*
   Where the maker of a note secured by a trust deed located the payee in another State, and informed him of his desire to pay the notes, which were then past due, and afterwards deposited funds in the bank used by the payee, there was sufficient tender of payment to prevent the latter from maturing the entire indebtedness for nonpayment, and foreclosing the trust deed. *Stansbury* v. *Embrey*, 103.

MUNICIPAL CORPORATIONS.

See ORDINANCES OF MORRISTOWN.

1. *Public improvements. Damages. Changing grade of streets. "All benefits accruing."*
   Under Acts 1891, ch. 31, as amended by Acts 1893, ch. 41, the first section of which allows to an abutting property owner consequential damages incident to changing the grade of a street, and the second section of which provides that "all benefits accruing" from such improvements shall be allowed to reduce the damages, "all benefits accruing" means accruing to the owner as owner of the particular property, not as a taxpayer or resident of the vicinity sharing benefits common to all. *Mayor & Aldermen* v. *Barton*, 177.
2. *Public improvements. Damages. Changing grade of streets.*
   Acts 1891, ch. 31, as amended by Acts 1893, ch. 41, secs. 1, 2, relating to the allowance of damages to abutting property owners from a change in the grade of a street and the deduction of benefit, is to be given a liberal construction in favor of the citizen affected. *Ib.*
3. *Ordinances. Reference.*
   Where a municipal ordinance referred by number to chapter 593 of the Acts of the General Assembly for 1909, and there was no such numbered chapter in the published acts, that part of the reference must be treated as wholly nugatory, but it will not impair the validity of the ordinance if there is sufficient otherwise to identify the act intended to be incorporated. *Operating Co.* v. *Chattanooga*, 196.
4. *Ordinances. Reference to statutes.*
   A city ordinance declared that each vocation, occupation and business named in chapter 593 of the Acts of the General Assembly for 1909, known as the "Revenue Bill," should be a privilege within the city, and the rate of taxation on such privileges should be the same for the city for the fiscal year

MUNICIPAL CORPORATIONS.

as provided in the revenue bill. The Acts of 1909 contained no chapter 593, but chapter 479, entitled "An act to provide revenue for the State of Tennessee and the counties and municipalities thereof," provides in section 4 that each occupation thereinafter named shall bear a certain tax, and thereafter enumerates various taxable occupations. *Held*, that as no person reading the ordinance and Acts of 1909 could fail to find the statute in question, it was properly incorporated into the ordinance by reference; incorporation by reference being recognized in case of deeds where the description may be so incorporated and in case of ordinances so far as the inclusion of directions and specifications. *Ib.*

5. *Ordinance. Reference.*

The Chattanooga ordinance, which in fixing privilege taxes upon occupations attempted by reference to incorporate the Revenue Act of 1909, is not rendered invalid because sections 5 and 7 of the act referred to a class of privileges over which municipal corporations could not have any control, because the tax is required to be paid directly to the State; for the purpose of the ordinance was obviously to confine its application to those forms of privilege which were open to municipal taxation. *Ib.*

6. *Ordinances. Reference.*

Where a municipal ordinance incorporates by reference a general statute, the statute in its entirety need not be set out in the ordinance or entered upon the minutes of the corporation. *Ib.*

7. *Torts. Obstructions in streets. Contributory negligence. Knowledge of defect.*

While a citizen, walking along a street, need not keep his eyes on the pavement all the time, and may assume that the city has done its duty, and may even be excused for temporary forgetfulness of a danger when his attention is distracted, where plaintiff, walking along the street after dark, was injured by falling over some stakes two or three feet high driven in the ground at the edge of the sidewalk, the presence of which he was familiar with, which he testified that he simply forgot, without offering any excuse, he is precluded by his negligence from recovery against the city. *Mayor and Aldermen* v. *Cain*, 250.

8. *Legislative control. Grant of franchise.*

The power to grant an exclusive franchise, even of the limited class which may be granted within the city, must be expressly

MUNICIPAL CORPORATIONS.

MUNICIPAL CORPORATIONS—Continued.

conferred upon the municipality by the legislature. *Noe* v. *Mayor and Aldermen*, 350.

9. *Power to grant. Constitutional provisions.*
Under Const., art. 1, sec. 22, forbidding perpetuities, and monopolies, the legislature cannot confer upon a municipality the power to grant an exclusive franchise for the conduct of a business which is of common right. *Ib.*

10. *Governmental powers. Municipal slaughterhouse.*
While the legislature might authorize a municipal corporation to establish a single slaughterhouse, to be conducted by its own agents, it would have to provide that all persons having animals to be slaughtered should have the right to resort to that place to do their own slaughtering, or to have it done by their own agents, or the act would be unconstitutional. *Ib.*

11. *Taxation. Statutory provisions. Equality and uniformity.*
Acts 1909, ch. 169, and Acts 1911, ch. 620, authorizing the county to issue bonds to build roads and to levy and collect taxes on all property in the county, including that within the corporate limits of any municipality, to pay the interest, and to create a sinking fund for the payment of the principal thereof, do not violate Const., art. 2, sec. 28, requiring all property to be taxed according to its value so that taxes shall be equal and uniform throughout the State, although municipalities within such county are also required to levy and collect taxes for the maintenance of their streets, in view of section 29, empowering the general assembly to authorize counties and incorporated towns to impose taxes for county and corporation purposes, and providing that all property shall be taxed according to its value upon the principles established in regard to State taxation, since the purpose of the tax is a proper county purpose, and property within a municipality within the county is therefore liable therefor. *King* v. *Sullivan County*, 393.

12. *Constitutional law. Impairing obligation of contracts.*
The matter of proper crossings of streets and railroads for the safety and welfare of the public is one within the police power, future exercise of which cannot be bargained away by a city, so that Const. U. S., art. 1, sec. 10, forbidding passage of laws impairing obligation of contracts, is not contravened by Acts 1907, ch. 149, sec. 25, empowering a city, by ordinance, to require a railroad to build or replace, bridges over its tracks at street crossings, and an ordinance requiring the company to build a new bridge at such a crossing, though prior to the

act, in consideration of contribution by the company to a bridge there built, the city contracted with it to forever after maintain a suitable bridge there. *Chattanooga* v. *Railroad*, 399.

13. *Dedication. Streets. Acceptance. User.*
The acceptance of a street by a municipality may be implied from a general and long-continued use thereof by the public as of right. *Doyle* v. *Chattanooga*, 433.

14. *Dedication. Acceptance of streets.*
The use of a street by the general public may operate as an acceptance thereof so as to bind the dedicator and make the dedication irrevocable. *Ib.*

15. *Defective streets.*
A city was responsible for the death of boys eleven and nine years of age by drowning in a pond which occupied the whole width of a public street, about 120 feet from a public park, in analogy to the rule imposing liability for maintaining an attractive nuisance. *Ib.*

NEGLIGENCE.

1. *Contributory negligence. Question for jury.*
Where the evidence shows without contradiction that plaintiff's negligence proximately contributed to his injury, the case is one for a peremptory instruction for the defendant. *Mayor and Aldermen* v. *Cain*, 250.

2. *Contributory negligence. Acts in emergency.*
Even if contributory negligence could be attributed to a young boy, he would not be guilty of such negligence in jumping into a pond to save his young brother from drowning, having acted in an emergency. *Doyle* v. *Chattanooga*, 433.

3. *Master and servant. Master's liability. Noncompliance with rules.*
Deceased, with other machinists, descended in a mining shaft to repair a pump after being warned by the master carpenter, repairing the upper part of the shaft, that they should not come into the shaft until they notified him by knocking on a pipe; but when the repair was finished the foreman said, "Come on," and went into the hoisting basket, followed by deceased, who, as he was getting into the basket, was hit by a piece of timber falling from the carpenters' work and killed. *Held*, that deceased had no right to infer that the foreman had obeyed the rule as to notice, and that, as he himself could

have given notice, his failure to observe the rule was negligence, defeating a recovery. *Zinc Co.* v. *Smith*, 447.

4. *Estoppel. Equitable estoppel.*
One who conducts himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss cannot invoke the doctrine of estoppel. *Bank* v. *Railroad*, 530.

5. *Estoppel.*
If a ground of estoppel is based on negligence, the negligence must have been the proximate cause of the conduct of the complaining party. *Ib.*

6. *Explosives. Contributory negligence.*
Plaintiff's son drove plaintiff's automobile to defendant's drug store to have it filled with gasoline, and, after stopping the machine in front of the store and ordering the gasoline, turned down the light of a lamp attached to the rear of the automobile about twenty inches under the cap of the tank into which the gasoline was poured, and walked away to talk to some boys. The side of the lamp next to defendant's store was of metal, so that the light did not show in that direction, and defendant's clerk brought out a five-gallon gasoline can, and, without noticing that the light was burning, placed a funnel in the mouth of the tank and lifted the can to pour gasoline into the tank, when some of the gasoline ran down and came in contact with the light causing an explosion. There was no proof whether the cap on the automobile tank was originally removed by plaintiff's son or by defendant's clerk. *Held*, that plaintiff's son was negligent in merely lowering the light and removing the tank cap and walking away, without explaining to defendant's clerk that the tank was not ready to be filled. *Grigsby & Co.* v. *Bratton*, 597.

7. *Contributory negligence. Proximate cause.*
If plaintiff's negligence continued up to the time of the accident and contributed thereto, either the negligence of the parties was concurrent, or else plaintiff could have avoided the accident, making his negligence in either event a proximate cause of the accident. *Ib.*

8. *Contributory negligence. Effect.*
Where plaintiff and defendant are both guilty of negligent acts which together constitute the proximate cause of the injury, plaintiff cannot recover. *Ib.*

ORDINANCES OF MORRISTOWN.

NEW TRIAL.

Criminal law. Appeal and error. Bill of exceptions. Evidence on motion for new trial.

Where the record in a criminal case showed that the defendant had pleaded not guilty, but testimony was introduced on the motion for a new trial that he had never been properly arraigned, the question cannot be considered on writ of error, where the bill of exceptions fails to show that it contains all the evidence offered on the motion for a new trial. *Odeneal* v. *State*, 60.

ORDINANCES OF MORRISTOWN.

1. *Municipal corporations. Governmental powers. Exclusive franchise.*

The ordinances of Morristown, providing for the selection of places for the inspection of animals to be slaughtered for food and for their sale at such places, and confirming a contract with a company, which ordinances, when construed together, made the premises of that company the only place for the inspection and slaughter of animals, are void as not being within the powers conferred by the charter of Morristown (Acts 1903, ch. 103.) *Noe* v. *Mayor and Aldermen*, 350.

2. *Municipal corporations. Police power. Regulation of slaughter-houses.*

The original ordinance of Morristown, providing for the selection of one or more places for the inspection and slaughtering of animals intended for food, when dissociated from the second ordinance and the contract selecting only one such place, recognizes that there may be more than one place of slaughter and more than one inspector, and is in the main sound. *Ib.*

3. *Municipal Corporations. Police power. Delegation of municipality.*

The provision of section 16 of that ordinance, conferring police power upon the inspector, is objectionable, as clothing him with powers which belong to the city, and not to an officer, except under ordinances defining his duty. *Ib.*

4. *Municipal corporations. Police powers. Delegation of municipality.*

The provision of section 13 of that ordinance, giving an inspector absolute power to dispose of condemned meat as he might deem best for the public health, is objectionable, since that matter should be controlled by law, and not by the mere will of the inspector. *Ib.*

OVERRULING DECISIONS—POSSESSION.

ORDINANCES OF MORRISTOWN—Continued.

5. *Municipal Corporations. Validity of ordinances. Prescribing weight of evidence.*

The provisions of that ordinance that certain acts should be "sufficient" evidence, rather than "*prima facie*" evidence, that the goods were on sale, are objectionable. Noe v. Mayor and Alderman, 350.

OVERRULING PREVIOUS DECISIONS.

Courts. Previous decisions.

It is almost as important that the law should be certain as that it should be sound; hence, though sometimes the duty is imperative to overrule a former decision, the power should be sparingly exercised. *Fargason* v. *Ball*, 137.

PENALTIES.

Principal and Surety. Fidelity bond. Loss. Failure to pay. Penalty.

Where, in an action on a fidelity bond, it appeared that the surety interposed its defense in good faith, and the construction of the policy as a whole presented a matter of some difficulty, the surety company, though ultimately found liable, was not subject to the penalty imposed by Acts 1901, ch. 141, on insurers for refusal to pay a loss within 60 days after demand, etc., unless such refusal shall have been in good faith. *Grain Co.* v. *Weaver*, 609.

POSSESSION.

1. *Trespass. Cutting timber. Defenses. Right of possession.*

Where one or two parties, who held deeds which overlapped as to a portion of the premises, had an inclosure upon the property covered by her deed, her possession extended to all the property described in her deed, including the interlap, so that one cutting timber therefrom with authority from her was not guilty of violating Shannon's Code, sec. 6496, subsec. 8, prohibiting the wanton destruction of the timber of another, even though the other party had the legal title to the interlap. *Butler* v. *State*, 164.

2. *Trespass. Cutting timber. Construction of statute.*

Shannon's Code, sec. 6496, subsec. 8, prohibiting the wanton destruction of timber of another, is intended to protect the possession, not the title, and does not apply to one cutting timber under the authority of one claiming title, who was in possession thereof, even though in fact another had the legal title. *Ib.*

PRACTICE—PRESUMPTION OF LAW AND FACT.

POSSESSION.—Continued.

3. *Adverse Possession. Possession of separate tracts.*
The possession of one of several adjoining tracts conveyed by the same deed was not constructive possession of either of the other tracts, where the tracts were separately described by the deed, and were not covered by one general boundary. *Camp* v. *Riddle*, 294.

4. *Adverse possession. Adverse holding. Inclosure by mistake.*
Where a purchaser of land accidentally or by mistake incloses a strip contiguous to his purchase, believing he is placing the fence on the boundary, and holds the strip so inclosed for seven years, his possession is adverse, and will avail against the true owner. *Williams* v. *Hewitt*, 689.

5. *Courts. Appellate Jurisdiction. Ejectment.*
Where a bill charged that complainant was the owner of land and entitled to its possession, and that defendant entered thereon and was claiming it under a pretended title, appropriating rents and profits, and prayed for adjudication of the title and for possession and rents, and the answer admitted possession, but denied complainant's title and right of possession, and set up defendant's own claim of title, and an amended bill reiterated complaint's claim, and attacked defendant's claim and sought to remove it as a cloud, the original bill made a case of ejectment of which the court of civil appeals has no jurisdiction under acts 1907, ch. 82, sec. 7; the relief sought in the amended bill being merely incidental thereto, and not devolving jurisdiction on that court. *Reeves* v. *Haynie*, 717.

PRACTICE AND PROCEDURE.

1. *Jury. Trial by jury. Waiver in misdemeanor cases.*
The defendant in a misdemeanor case, may waive a jury trial. *Metzner* v. *State*, 45.

2. *Equity. Pleading. Practice.*
Every reasonable presumption should be exercised in favor of a bill when assailed by demurrer. *Adams* v. *Chattanooga Co.*, 505.

PRESUMPTION OF LAW AND FACT.

1. *Evidence. "Presumption." What constitutes.*
A "presumption" is a conclusion reached by means of the weight of proven circumstances, and before it can exist the circumstances which attend must be in evidence. *Marquet* v. *Insurance Co.*, 213.

PROXIMATE CAUSE—RAILROADS.

PRESUMPTION OF LAW AND FACTS—Continued.

2. *Criminal law. Character of accused. Instructions.*
Where, in a prosecution for murder, accused did not introduce evidence as to his good character for peace and quietness, the court properly overruled his request to charge that there was a presumption of his good character which stood as a witness for him, and should be looked to by the jury as having effect upon reasonable doubt of his guilt, since, though there was a presumption of his good character, in the sense that, in the absence of proof, the jury was not warranted in assuming that he was of bad character, it was not such a presumption as could be made the basis of inference to strengthen his presumption of innocence and thereby the resultant—reasonable doubt. *Durham* v. *State*, 636.

PROXIMATE CAUSE.

1. *Carriers. Delivery of goods. Bill of lading. Failure to require. Evidence.*
In an action by the holder of a bill of lading for damages because defendant railroad company surrendered freight without presentation of the bill of lading, evidence *held* to show that such negligence by the railroad company was not the proximate cause of the bank's loss. *Bank* v. *Railroad*, 530.
2. *Explosives. Negligence.*
The negligence of plaintiff's son was the proximate cause of the explosion. *Grigsby & Co.* v. *Bratton*, 597.
3. *Negligence. Contributory negligence.*
If plaintiff's negligence continued up to the time of the accident and contributed thereto, either the negligence of the parties was concurrent, or else plaintiff could have avoided the accident, making his negligence in either event a proximate cause of the accident. *Ib.*
4. *Negligence.*
"Proximate cause" does not necessarily mean that which is last in time or place, but means that which is the procuring and efficient cause of the accident, and indicates, rather, nearness in causal relation. *Ib.*

RAILROADS.

1. *Construction. Highway crossings. Statute. Construction.*
Acts 1899, ch. 356, requiring railroad companies to grade public road crossings to a level with the rails of the railroad, and to keep same in repair for a distance of ten feet on each

RAILROADS.

side of the track, is supplementary of, and auxiliary to, Acts 1889, ch. 119, providing for the furnishing and keeping in repair of good and sufficient crossings, and hence is not repugnant to same, and does not impliedly repeal it. *Railroad* v. *State*, 172.

2. *Construction and maintenance. Crossing highways. "Crossing."*

The word "crossing," as applied to the intersection of a common highway and a railroad, and as used in the statutes relating to such crossings, means the entire structure, including the necessary approaches, though a part may be outside of the railroad's right of way. *Ib.*

3. *Death. Cause of action. Statutes. Interstate commerce employee.*

Act April 22, 1908, known as the Employers' Liability Act, ch. 149, sec. 1, 35 Stat., 65 (U. S. Comp. St. Supp., 1911, p. 1322), declares a carrier by railroad liable in damages to a "person suffering injury" while employed by it in interstate commerce, or, in case of his death, to his personal representative, for the benefit of certain relatives. Section 9, added to such chapter by Act April 5, 1910, ch. 143, sec. 236 Stat., 291 (U. S. Comp. St. Sup., 1911, p. 1325), provides that any right of action given by this act to a "person suffering injury" shall survive to his representative. *Held*, that section 9 creates no new cause of action, but merely preserves, by survival, the cause of action given the employee, and therefore has no application where there is an instantaneous killing, right of action for the killing in such case being given the personal representative. *Carolina* v. *Shewalter*, 363.

4. *Street crossings. Police power.*

Acts 1907, ch. 149, sec. 25, empowering a city to require, by ordinances, railroad companies to build, maintain, repair, or replace at their own expense such bridges and approaches over their tracks when crossing any streets as the council may deem necessary to the safety and convenience of travelers on the street, and an ordinance pursuant thereto are within the scope, and an exercise, of the police power. *Chattanooga* v. *Railroad*, 399.

5. *Street and railroad crossings. Power to require bridges.*

Under the common law a city could require a railroad to construct and maintain, at its expense, a proper bridge at a street crossing over its tracks. *Ib.*

RECOVERY—RESPONDEAT SUPERIOR.

RAILROADS—Continued.

6. *Injunction. Contempt.*

Where a temporary injunction issued to restrain a railroad company from condemning a right of way immediately in front of complainant's residence was dismissed on stipulation, which provided that both parties should apply for dismissal, and that the road should be constructed in a certain manner, and the trains operated at less than a certain rate of speed, the officers of the railroad company cannot be proceeded against as for contempt for violation of the injunction because they operated the trains at a greater rate of speed. *Caldwell* v. *Railroad*, 697.

RECOVERY.

1. *Gaming. Recovery of money lost. Parties entitled to recover. Statutes. Construction.*

Shannon's Code, sec. 3162, authorizing actions to recover for the benefit of the wife or children of the loser of money in a gambling transaction, does not limit right to recover for the benefit of minor children of a loser in a gaming transaction, but a recovery may be had for the benefit of adult children. *Coles* v. *Morrow*, 550.

2. *Negligence. Contributory negligence. Effect.*

Where plaintiff and defendant are both guilty of negligent acts which together constitute the proximate cause of the injury, plaintiff cannot recover. *Grigsby & Co.* v. *Bratton*, 597.

3. *Principal and Surety. Fidelity bond. Warehouse receipts. Pledge.*

Where a warehouseman's superintendent was bonded to secure a bank against fraudulent warehouse receipts that might be pledged to it to secure loans to the warehouse company, and fraudulent receipts were issued for more grain than was deposited under them, which receipts were pledged to the bank, it was not material, either to the surety's liability, or to the bank's right to recover under the bond, that the warehouse company, after pledging the receipts, disposed of all of the grain covered thereby. *Grain Co.* v. *Weaver*, 609.

RESPONDEAT SUPERIOR.

Trial. Joint defendants. Verdict for servant. Effect as to master.

When a master is sued solely for misfeasance or nonfeasance on the part of his servants and is liable for their conduct only under the doctrine of *respondeat superior*, a verdict, permitted

ROADS AND BRIDGES—SALES.

RESPONDEAT SUPERIOR—Continued.

to stand in favor of such servants, either in the same action or in a prior action, entitles the master to a discharge from such claimed liability. *Loveman Co.* v. *Bayless*, 307.

ROADS AND BRIDGES.

1. *Railroads. Street crossings. Police power.*
Acts 1907, ch. 149, sec. 25, empowering a city to require, by ordinances, railroad companies to build, maintain, repair, or replace at their own expense such bridges and approaches over their tracks when crossing any streets as the council may deem necessary to the safety and convenience of travelers on the street, and an ordinance pursuant thereto are within the scope, and an exercise, of the police power. *Chattanooga* v. *Railroad*, 399.
2. *Railroads. Street and railroad crossings. Power to require bridges.*
Under the common law a city could require a railroad to construct and maintain, at its expense, a proper bridge at a street crossing over its tracks. *Ib.*

SALES.

1. *Conditional sales.*
A conditional vendor only has a lien as security for the purchase money by the retention of title, and does not own the property absolutely. *Nance* v. *Piano Co.*, 1.
2. *Fraudulent Conveyances. Judgment. Creditor's suit. Issues, proof, and variance.*
In a suit against a purchaser of a stock of goods who failed to comply with the Bulk Sales (Laws 1901, ch. 133), relative to ascertaining and notifying the creditors of the seller, a variance between the bill describing plaintiff as a creditor of a firm of which the seller was a member and the evidence showing that it was an individual creditor of the seller was immaterial; no relief being sought against the partnership, and the partnership having no assets. *Mahoney-Jones Co.* v. *Sams Bros.*, 207.
3. *Fraudulent Conveyances. Sales in bulk. Statutory provisions.*
Under the Bulk Sales Law (Laws 1901, ch. 133), providing that, where any portion of a stock of merchandise is sold otherwise than in the ordinary course of trade, the sale shall be presumed fraudulent and void as against creditors of the seller, unless the purchaser shall make inquiry of the seller as

to his creditors, and shall notify them personally or by registered mail of the proposed sale, upon a sale of merchandise in bulk by an individual, creditors of a partnership of which he was a member were entitled to notice. *Mahoney-Jones Co.* v. *Sams Bros.*, 207.

4. *Fraudulent Conveyances. Sales in bulk. Statutory Provisions.*
Under the Bulk Sales Law (Laws 1901, ch. 133, providing that a sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade shall be presumed fraudulent and void as against the creditors of the seller, unless the requirements of that act are complied with, a sale of goods separated from a stock of merchandise to the value of about one-half of the whole stock, without a compliance with the statute, was a violation thereof. *Ib.*

5. *Judicial sales. Sale by master. Effect of confirmation.*
A bid at a master's sale continues a mere offer until the court rejects it or accepts it by confirming the report of sale, but such confirmation only gives the purchaser an equitable title, the legal title not vesting until a deed is made by the master pursuant to a decree, or the lapse of a reasonable time after the master is ordered to make a deed, if he fails to do so. *Camp* v. *Riddle*, 234.

6. *Assignments for Benefit of Creditors. Sale of property.*
In a special assignment in trust for creditors, a direction to sell "to the highest bidder either at public or private sale" imports a sale for cash, and, when the trustee and a preferred creditor assume to make a credit sale, they become absolutely responsible for the whole price. *Saunders* v. *Lanier*, 693.

SET-OFF.

Principal and Surety. Remedies of surety.
A surety or an indorser of a promissory note, who pays the debt due from his principal, may, if the principal be insolvent, enforce an equitable set-off against any demand sued on by such principal. *Lumber Co.* v. *Lumber Co.*, 11.

See CLAIMS AND COUNTERCLAIMS.

STATUTES AND STATUTORY CONSTRUCTION.

1. *Constitutional law. Innkeepers. Due process of law.*
The statute does not violate Const., art. 1, sec. 8, prohibiting one from being deprived of property except by the law of the land. *Nance* v. *Piano Co.*, 1.

STATUTES AND STATUTORY CONSTRUCTION.

STATUTES AND STATUTORY CONSTRUCTION.—Continued.

2. *Statutes. Construction. Legislative Intent.*
The court construing a statute, will seek to ascertain the legislative intent, by considering the words used and the meaning which the legislature attached to them, where they are capable of being used in more than one sense, and the context, when taken in connection with the nature of the subject, may require that the ordinary meaning of the words used be restricted or enlarged to effectuate the legislative intent. *Bank & Trust Co.* v. *Walker*, 22.

3. *Equity. Statutory provisions. Repeal by Implication.*
Acts 1851-52, ch. 365, sec. 9, which was carried into Shannon's Code as section 6181, provides that the filing of an answer is a waiver of objection to the jurisdiction of the court of chancery and the cause will not be dismissed, but will be determined on its merits, although the court be of the opinion that the matters complained of are of legal cognizance. Acts 1877, ch. 97, carried into Shannon's Code as section 6109, provides that the court of chancery shall have jurisdiction of all actions triable in the circuit court, except actions for injuries to persons, property, or character involving unliquidated damages. *Held*, that the act of 1851, in so far as it applies to the exceptions in the act of 1877, was repealed by implication, although it remains in force as to objections to jurisdiction over the person of the defendant or the local *status* of the litigation and consequently the filing of an answer by the defendant is not a waiver of objections to jurisdiction, where the action is one falling within the exceptions of the statute. *Swift & Co.* v. *Warehouse Co.*, 82.

4. *Statutes. Title of Act. Crimes. Amending act.*
The title of Acts 1870-71, ch. 36, which was "An act to amend the laws upon the subject of trespass upon property and malicious mischief," was broad enough to include section 1 of the act, which now appears as Shannon's Code, sec. 6496, subsec. 8, forbidding the wanton destruction of valuable timber of another, since that title evidently intended to embrace the matters within the article of the Code of 1858 in which the original section appeared, and which was entitled "Trespass on Property, Malicious Mischief and Keeping Dogs That Kill Sheep." *Butler* v. *State*, 164.

5. *Trespass. Cutting timber. Construction of statute.*
Shannon's Code, sec. 6496, subsec. 8, prohibiting the wanton destruction of timber of another, is intended to protect the possession, not the title, and does not apply to one cutting

STATUTES AND STATUTORY CONSTRUCTION.

STATUTES AND STATUTORY CONSTRUCTION.—Continued.

timber under the authority of one claiming title, who was in possession thereof, even though in fact another had the legal title. *Butler v. State*, 164.

6. *Municipal Corporations. Ordinances. Reference.*
Where a municipal ordinance incorporates by reference a general statute, the statute in its entirety need not be set out in the ordinance or entered upon the minutes of the corporation. *Operating Co.* v. *Chattanooga*, 196.

7. *Courts. Rules of decision. Decisions of courts of other States.*
While a construction given to a foreign statute closely similar to one of this State is useful and to be accorded reasonable consideration, it is in no sense authoritative, nor is it as persuasive as a deliverance of the same court upon the common law, since each sovereignty must construe its own statute. *Mahoney-Jones* v. *Sams Bros.*, 207.

8. *Costs. Statutes. Repeal.*
The Jarvis act (Laws 1897, ch. 20), which declares that neither the State nor any county shall be liable for costs or fees in any criminal prosecution, except in cases of certain felonies, or where the defendant has been sent to the workhouse under the small offense law, or where he has been convicted in a court of record and execution against him returned *nulla bona*, is a repeal by implication of all statutes, in force at the time of its passage, fixing liability upon the State or county for costs or fees in criminal prosecutions not within the exceptions. *State, ex rel.*, v. *Drummond*, 271.

9. *Statutes. Repeal. By Implication.*
A repeal by implication can operate only where there is such a repugnance or conflict between the subsequent statute and an earlier one that the two cannot stand together. *Ib.*

10. *Prisons. Care of prisoners. Sheriff's fees. Liability of county. "Boarding."*
The expression "boarding," as used in the Jarvis Act (Laws 1897, ch. 20), providing that neither the State nor any county thereof shall be liable in any criminal prosecution for any costs or fees, but that compensation for boarding prisoners shall be paid in all cases as heretofore, includes not only the compensation to which a jailer is entitled for furnishing prisoners with food, bedding, and water, but for the keeping of such prisoners in custody; and hence the statute did not repeal Shannon's Code, sec. 6412, providing that jailers shall receive forty cents a day for each prisoner fed, and for each turnkey one dollar, but that only two turnkeys shall be allowed for each prisoner. *Id.*

STATUTES AND STATUTORY CONSTRUCTION.

STATUTES AND STATUTORY CONSTRUCTION.—Continued.

11. *Evidence. Recital of deed. Effect.*

Acts 1907, ch. 334, sec. 1, provides that all conveyances in an official capacity by a public officer, or one acting in a fiduciary relation, shall be admitted as *prima facie* evidence of the facts recited therein, so far as they relate to the execution of the powers of the office, and section 2 requires all such instruments of record when the act was passed, be admitted in accordance with section 1. *Held*, that recitals, in a master's deed to a land belonging to an estate, that decedent left a will which authorized his executor to sell his interest in the land, and that the executor had sold such interest to a person named, to whom the deed purported to convey the legal title, were *prima facie* evidence of the facts recited. *Camp.* v. *Riddle*, 294.

12. *Contracts. Lessening competition. Sale of business.*

The provision of a contract, by which one sells his stock of goods and the fixtures of his store, that he will not in that town for five years engage in business in competition with the buyer, does not "tend to lessen free and full competition" in the sale of articles that had become a part of the mass of the property in the State, in violation of Acts 1903, ch. 140, sec. 1; the meaning of "competition," or of undue or unreasonable restraint of trade, under the common law, not being changed by the statute. *Baird* v. *Smith*, 410.

13. *Statutes. Enactment at extraordinary session. Proclamation of governor. "Maintain." Appropriations.*

An appropriation of $25,000 to the National Conservation Exposition Company, a corporation, created for the purposes of holding expositions, encouraging and supporting agriculture, industrial enterprises, and the breeding of blooded live stock and poultry, made by the legislature in extraordinary session, and contained in the general appropriation bill under the head of "Department of Agriculture," was not embraced within the call of the governor, which was "to make such appropriations of the public moneys as may be deemed necessary and proper to maintain the State's institutions, offices and departments," since, though some of the purposes of the corporation were identical with those of the agricultural department, and it, in carrying out its purposes, might indirectly aid the department, it was a separate institution in no way connected with the agricultural department, and the word "maintain" as used in the governor's call meant, if not direct maintenance by an appropriation to the department itself, at least one under its con-

trol; hence the appropriation was void, because in violation of Const., art. 3, sec. 9, authorizing the governor to convene the general assembly by a proclamation limiting their power specifically to the purposes for which they are convened. *State, ex rel.*, v. *Woollen*, 456.

14. *Constitutional Law. Back Taxes. Assessment. Hearing before assessing officer.*

It is not necessary that the statute providing for the assessment of back taxes should provide the taxpayer with an opportunity for hearing before the county trustee making the assessment; it being sufficient that the taxpayer is given an opportunity to appeal to the board of equalization and that he is afforded an opportunity to review the proceedings of the board in the courts by *certiorari*. *Fertilizer Co.* v. *McFall*, 645.

STOCKS AND BONDS.

Corporations. Transfer of assets. Rights of creditors.

Where a corporation pending a suit against it transferred all of its property to another corporation, which agreed to assume payment of certain debts not including the one in suit, "and none other," and the purchaser in exchange therefor issued its own stock and bonds which, without provision for the creditors of the seller, it permitted to be distributed among the seller's stockholders, most of whom were nonresidents, the purchaser was a party, with full notice, to the diversion of the trust fund, and as such held the property acquired by it impressed with the same trust with which it was originally charged, and was liable to the seller's creditors to the extent of the value of the property thus obtained; the creditors not being required to look alone to such stock and bonds. *Jennings, Neff & Co.* v. *Ice Co.*, 231.

SURETY AND SURETYSHIP.

1. *Principal and Surety. Remedies of surety.*

A surety or an indorser of a promissory note, who pays the debt due from his principal, may, if the principal be insolvent, enforce an equitable set-off against any demand sued on by such principal. *Lumber Co.* v. *Lumber Co.*, 11.

2. *Set-off and Counterclaim. Assigned rights. Rights of indorser.*

Where an indorser of a promissory note paid the same upon the default of the insolvent maker, the mere fact that the note was reassigned to the indorser will not preclude it from claiming to be treated as a surety, and so entitled to set off

SURETY AND SURETYSHIP.

SURETY AND SURETYSHIP.—Continued.

the note against a claim assigned by the maker to plaintiff. *Ib.*

3. *Executors and Administrators. Actions.*
Where a libel contained in a will as published by the probate thereof, the testator, and not the executor, was liable since a principal is responsible where authority is given to an agent to publish libelous words, and the publication is made in substantial accord with such authority and the publication by the executor was in literal pursuance of the authority given; it being his duty to probate the will. *Puckett* v. *Griffith*, 565.

4. *Judgment. Bill to set aside. Laches.*
Where it appeared that the complainant, in a suit to set aside, for fraud in procurement, the entry of his name as stayor of a judgment rendered by a justice of the peace, made no effort to ascertain from sureties of the principal debtor whether they desired him to become stayor, and that the sureties promptly disaffirmed the stay, complainant, by reason of his inattention, was not entitled to have the judgment set aside. *Ib.*

5. *Principal and Surety. Fidelity bond. Conditions. Performance by employer. Omission. Rights of third persons.*
Where a surety company executed a fidelity bond for the benefit of a bank, insuring against loss sustained by the issuance of fraudulent warehouse receipts by the alleged superintendent of a warehouse, which might be pledged by the warehouse company to the bank, the fact that the warehouse company misrepresented the employee's position as warehouse superintendent, when, in fact, he was a mere bookkeeper, and that the warehouse company failed to inform the surety of the employee's default, etc., did not relieve the surety from liability for such defaults to the bank; the bank being under no obligation to the surety company to see that such conditions of the bond were complied with. *Grain Co.* v. *Weaver*, 609.

6. *Principal and Surety. Fidelity bond. Extent of liability.*
Where a bond secured plaintiff bank against the issuance of fraudulent warehouse receipts by the superintendent of a warehouse in so far as such receipts might be pledged by the warehouse company to the bank, and receipts issued by the superintendent for an amount of grain in excess of that deposited were pledged to the bank, the surety's liability on the bond was the difference between the value of the grain called for by the receipts and the value of the amount actually stored under each of them at the time they were issued. *Ib.*

TAXES AND TAXATION.

SURETY AND SURETYSHIP—Continued.

7. *Principal and Surety. Discharge of sureties. Loss of other securities.*

The security provided by a special assignment for creditors inured to the benefit of sureties on a note secured thereby, and, a portion thereof being lost by negligence of the payee in actively assisting to sell the trust property, and taking in part therefor an insolvent note, or in making a credit sale at all, he, and not the sureties, must bear the loss. *Saunders* v. *Lanier*, 693.

TAXES AND TAXATION.

1. *Inheritance tax. Appraisement and judgment.*

Under Acts 1893, ch. 174, sec. 12, providing that any interested person, not satisfied with an appraisement of property subject to an inheritance tax, shall have the right to file exceptions thereto in writing, on giving security to pay all costs, together with whatever tax shall be fixed by the county court, and thereupon to have the county court hear such exceptions, that the county court shall have jurisdiction to determine all questions of valuation and of the liability of the appraised estate for such tax, subject to the right of appeal, and that if an appeal is prosecuted to the circuit court the cause shall be heard *de novo*, the county and circuit courts have power to render a judgment for the amount of the tax and costs; their power not being limited to passing on the correctness of the valuations contained in the appraiser's report, the proceeding amounting to a suit regularly instituted, notwithstanding section 14, expressly providing for a suit to enforce the tax lien on realty at the end of one year after the decedent's death, and section 15, providing for a suit commenced by notice or bill where any tax has not been paid according to law. *Deen* v. *Crenshaw*, 123.

2. *Inheritance tax. Collection. Attorney's fees.*

Under Acts 1893, ch. 174, sec. 12, providing that any interested person, not satisfied with the appraisement of property subject to an inheritance tax, shall have the right to file exceptions thereto, on giving security to pay all costs, together with whatever tax shall be fixed by the county court, whereupon such court shall have jurisdiction of the matter, subject to the right of appeal to the circuit court, section 14, relative to actions to enforce a tax lien on realty, which provides that, if the court adjudges the tax to be due and a charge upon

the real estate, it shall tax up as a part of the costs a reasonable attorney's fee for the clerk's attorney, and section 16, providing that clerks of county courts shall be the agents of the state for the collection of such tax, that it shall be their duty when necessary to employ an attorney, and that the fees of such attorney shall be taxed up by the court as costs against the delinquent, if he shall be held liable, it was proper for the county court, on the hearing of exceptions to the appraisement, which were overruled, to tax a reasonable attorney's fee for the clerk's attorney as a part of the costs. *Ib.*

3. *Inheritance tax. Collection. Attorney's fees.*
On appeal in a proceeding for the collection of an inheritance tax, in which the county court taxed an attorney's fee for the attorney of the clerk of the county court, the supreme court could make such reduction in the fee allowed as would bring it down to a reasonable amount, and commensurate with the work done and the responsibility assumed. *Ib.*

4. *Inheritance tax. Collection. Costs.*
Where, on the hearing of exceptions to the appraisement of real property subject to an inheritance tax, by agreement of the parties the valuation was reduced to the amount received on a sale subsequent to the appraisement, but not to the valuation insisted on in the exceptions, and the county court thereupon overruled the exceptions, the reduction by agreement, based on a fact transpiring after the taking of the appeal to the county court, did not make the heirs the successful parties on the appeal, and hence costs were properly taxed against them. *Ib.*

5. *Inheritance tax. Time for collection.*
Acts 1893, ch. 174, sec. 4, provides that, if an inheritance tax is paid within three months after the death of the deceased, a discount of five per cent shall be allowed, and if not paid at the end of one year from the death of a decedent, "at which time it shall be due," interest shall be charged. Section 8 makes it the duty of persons to whom real estate descends to notify the clerk of the county court immediately upon the vesting of the estate. Section 14 requires that, when any such tax on real estate shall have remained due and unpaid for one year, the clerk of the county court shall proceed by bill or petition to enforce the lien, and also provides that if the clerk knows of any good and sufficient reason why payment of the tax has been delayed, he shall not be compelled to

file the bill immediately upon the tax becoming due, but in his discretion may postpone the bringing of such suits to such times as he deems proper within the limits of the act. Section 3 requires the owner of personal estate subject to the tax to make a full report and return to the clerk within one year, and within that time to enter into security for its payment and provides that in case of failure so to do the tax shall be immediately payable and collectible. Section 5 provides for the deduction of the amount of the tax by executors or administrators from legacies or distributive shares, and provides that every sum of money retained by any executor or administrator, or paid into his hands on account of any legacy or distributive share for the use of the State, shall be paid by him without delay to the county clerk. *Held*, that the tax is due at the death of the decedent, the expression "at which time," in section 4, referring to the date of death, and hence, although the clerk of the county court might wait one year before proceeding to collect the tax, he was not bound to do so, and a judgment in a proceeding to collect the tax commenced within one year was not erroneous, although execution thereon should have been stayed until the expiration of one year. *Deen v. Crenshaw*, 123.

6. *Municipal Corporations. Ordinance. Reference to statutes.*
A city ordinance declared that each vocation, occupation and business named in chapter 593 of the Acts of the General Assembly for 1909, known as the "Revenue Bill," should be a privilege within the city, and the rate of taxation on such privileges should be the same for the city for the fiscal year as provided in the revenue bill. The Acts of 1909 contained no chapter 593, but chapter 479, entitled "An act to provide revenue for the State of Tennessee and the counties and municipalities thereof," provides in section 4 that each occupation thereinafter named shall bear a certain tax, and thereafter enumerates various taxable occupations. *Held*, that as no person reading the ordinance and Acts of 1909 could fail to find the statute in question, it was properly incorporated into the ordinance by reference; incorporation by reference being recognized in case of deeds where the description may be so incorporated and in case of ordinances so far as the inclusion of directions and specifications. *Ib.*

7. *Municipal Corporations. Ordinance. Reference.*
The Chattanooga ordinance, which in fixing privilege taxes upon occupations attempted by reference to incorporate the Revenue

TAXES AND TAXATION.—Continued.

Act of 1909, is not rendered invalid because sections 5 and 7 of the act referred to a class of privileges over which municipal corporations could not have any control, because the tax is required to be paid directly to the State; for the purpose of the ordinance was obviously to confine its application to those forms of privilege which were open to municipal taxation. *Ib.*

8. *Commerce. Interstate commerce. Burden upon.*

An occupation tax may be imposed upon one engaged in the sale of liquors, though all of his purchases and all of his sales are made without the State, without imposing a burden on interstate commerce; his business being situated within the State. *Ib.*

9. *Statutory provisions. Equality and uniformity.*

Acts 1909, ch. 169, and Acts 1911, ch. 620, authorizing the county to issue bonds to build roads and to levy and collect taxes on all property in the county, including that within the corporate limits of any municipality, to pay the interest, and to create a sinking fund for the payment of the principal thereof, do not violate Const., art. 2, sec. 28, requiring all property to be taxed according to its value so that taxes shall be equal and uniform throughout the State, although municipalities within such county are also required to levy and collect taxes for the maintenance of their streets, in view of section 29, empowering the general assembly to authorize counties and incorporated towns to impose taxes for county and corporation purposes, and providing that all property shall be taxed according to its value upon the principles established in regard to State taxation, since the purpose of the tax is a proper county purpose, and property within a municipality within the county is therefore liable therefor. *King* v. *Sullivan County*, 393.

10. *Statutory provisions. Equity and uniformity. "Uniform taxation."*

Under Const., art, 2, sec. 28, providing that taxes shall be equal and uniform throughout the State, the uniformity required is limited to a uniformity in rate assessment, and valuation of the particular tax involved, and has no reference to a uniformity of the sum total of taxes which a citizen is required to pay. *Ib.*

11. *Constitutional Law. Due process of law. Tax proceedings. Hearing. Interested party.*

Revenue Act 1907, ch. 602, sec. 30, requiring back tax proceedings to be instituted and heard before the county trustee, whose

TAXES AND TAXATION.

TAXES AND TAXATION.—Continued.

compensation, by section 48, is made to depend on the amount adjudged to be due from the taxpayer in such proceedings, does not for that reason deprive the taxpayers of due process of law in that the trustee is a party in interest, nor is the taxpayer for that reason deprived of a hearing in accordance with the "law of the land." *Fertilizer Co. v. McFall*, 645.

12. *Constitutional Law. Back taxes. Assessment. Hearing before assessing officer.*

It is not necessary that the statute providing for the assessment of back taxes should provide the taxpayer with an opportunity for hearing before the county trustee making the assessment; it being sufficient that the taxpayer is given an opportunity to appeal to the board of equalization and that he is afforded an opportunity to review the proceedings of the board in the courts by *certiorari*. *Ib.*

13. *Constitutional Law. Due process of law. Back tax proceedings. Notice.*

The notice required to be given to a taxpayer in back tax proceedings required by Acts 1907, ch. 602, being such as to advise the taxpayer that back assessment proceedings are to be begun against him, is sufficient; the burden being on him to show that he has paid taxes on all his property at a fair valuation. *Ib.*

14. *Constitutional Law. Assessment. Back taxes. Notice.*

Where property owner actually participated in proceedings to make an assessment of back taxes against his property, he could not thereafter complain that the statute did not provide for a sufficient notice of the proceedings. *Ib.*

15. *Back assessment. Statutes. Application.*

Revenue Act 1907, ch. 602, in so far as it provides for the back assessment of taxes, merely undertakes to provide a new remedy for the collection of taxes already delinquent at the time of its passage, and hence taxes on omitted property accruing prior to the adoption of the act were recoverable thereunder. *Ib.*

16. *Manufacturing corporations. Assessment of stock. Exemption.*

Revenue Acts 1907, ch. 602, sec. 8, provides that all personal property shall be assessed under certain classes, class 6 including shares of stock, except when the corporate property or capital stock is assessed, in lieu of the shares of stock, as provided in section 22, which declares that each manufacturing corporation, whether foreign or domestic, shall pay an *ad valorem* on the actual cash value of its capital stock or corporate property,

including franchises, easements, incorporeal rights and privileges, and all other corporate property, which shall not be less than the actual cash value of both its shares of stock and its bonded debt, etc. *Held*, that it was the legislative intention under such act to assess the capital stock and corporate property of all manufacturing corporations, whether foreign or domestic, and hence the shares of such corporations so assessed were exempt from further taxation. *Ib.*

TENDER.

1. *Payment.*

   As a rule, it is sufficient if a debtor tenders payment of a note on the due date at the place of payment, even though the creditor be absent; the debtor not being required to follow the creditor. *Stansbury* v. *Embrey*, 103.

2. *Mortgages. Payment. Sufficiency of tender.*

   Where the maker of a note secured by a trust deed located the payee in another State, and informed him of his desire to pay the notes, which were then past due, and afterwards deposited funds in the bank used by the payee, there was sufficient tender of payment to prevent the latter from maturing the entire indebtedness for nonpayment, and foreclosing the trust deed. *Ib.*

3. *Bills and notes. Place of payment.*

   The making of notes payable "at any bank" in a city authorized the maker to require the holder of the notes to make his election at what bank he would receive payment, and on failure to elect, the maker could elect to make payment at a certain bank, and give notice of his election to the holder. *Ib.*

TITLE.

1. *Trespass. Cutting timber. Construction of statute.*

   Shannon's Code, sec. 6496, subsec. 8, prohibiting the wanton destruction of timber of another, is intended to protect the possession, not the title, and does not apply to one cutting timber under the authority of one claiming title, who was in possession thereof, even though in fact another had the legal title. *Butler* v. *State*, 164.

2. *Judicial sales. Sale by master. Effect of confirmation.*

   A bid at a master's sale continues a mere offer until the court rejects it or accepts it by confirming the report of sale, but such confirmation only gives the purchaser an equitable title,

TRESPASS.

TITLE.—Continued.

the legal title not vesting until a deed is made by the master pursuant to a decree, or the lapse of a reasonable time after the master is ordered to make a deed, if he fails to do so. *Camp* v. *Riddle*, 294.

3. *Judicial sales. Passing of title. Sale by master.*

A sufficient time did not, as a matter of law, elapse between December, 1876, when a decree directed a master to make a deed for land purchased at a judicial sale, and February 12, 1877, to vest legal title in the purchaser without a deed, under the rule that title will vest in a purchaser within a reasonable time after a master is ordered to make a deed, if he does not do so. *Ib.*

4. *Trusts. Sale of trust property for reinvestment. Title of purchaser.*

In view of Shannon's Code, sec. 5085, providing that the purchasers of property judicially sold for reinvestment shall take good title if the provisions of the law have been substantially complied with, notwthstanding the errors of the court, a decree providing for the sale of trust property passes good title to the purchaser, who paid his money into court, even though it did not sufficiently protect the interests of contingent remaindermen, for while the proceeds of such sale must, under section 5087, be reinvested for the benefit of the parties interested, the purchaser is not charged with any trust to see to the reinvestment. *Realty Co.* v. *Andrews*, 725.

TRESPASS.

1. *Statutes. Title of Act. Crimes. Amending act.*

The title of Acts 1870-71, ch. 86, which was "An act to amend the laws upon the subject of trespass upon property and malicious mischief," was broad enough to include section 1 of the act, which now appears as Shannon's Code, sec. 6496, subsec. 8, forbidding the wanton destruction of valuable timber of another, since that title evidently intended to embrace the matters within the article of the Code of 1858 in which the original section appeared, and which was entitled "Trespass on Property, Malicious Mischief and Keeping Dogs That Kill Sheep." *Butler* v. *State*, 164.

2. *Cutting timber. Defenses. Right of possession.*

Where one of two parties, who held deeds which overlapped as to a portion of the premises, had an inclosure upon the property covered by her deed, her possession extended to all

TRUSTS AND TRUSTEES.

the property described in her deed, including the interlap, so that one cutting timber therefrom with authority from her was not guilty of violating Shannon's Code, sec. 6496, subsec. 8, prohibiting the wanton destruction of the timber of another, even though the other party had the legal title to the interlap. *Ib.*

TRUSTS AND TRUSTEES.

1. *Resulting trust. Relationship between parties.*
   The general rule that, where one buys land in the name of another and pays the consideration therefor, the land will be held in trust for the person paying the consideration does not apply where a parent purchases land in the name of his child or a husband in the name of his wife, in which case an advancement or gift will be presumed from the relationship. *Ferguson* v. *Booth*, 259.

2. *Appointment of trustees. Parties.*
   Both under the general equity practice and Shannon's Code, sec. 5429, providing that upon the death of a trustee a new trustee may be appointed, upon application by the beneficiaries by petition making all necessary parties defendant, the question of the necessity of parties rests in the discretion of the chancery court, being largely a question of expediency; and hence, while all persons interested should generally be made parties, the court of chancery having jurisdiction of the trust *res* may proceed, although contingent remaindermen were not parties. *Realty Co.* v. *Andrews*, 725.

3. *Appointment. Parties.*
   In a proceeding to appoint a trustee to succeed a deceased trustee, the heirs of the deceased trustee are not necessary parties, for they have not power respecting the trust estate or any interest therein, except the naked legal title. *Ib.*

4. *Appointment. Attack.*
   While by reason of lack of parties the appointment of a trustee may be irregular, still, where the omitted parties were only contingent remaindermen and the heirs of a deceased trustee, the appointment is at most irregular, and cannot be collaterally attacked. *Ib.*

WILLS.

VENDOR AND VENDEE.

See SALES.

VERDICT.

1. *Appeal and error. Review. Reduction of verdict.*
   The reduction of the verdict in an action for death, being upheld by the court of civil appeals, will not be interfered with by the supreme court. *Carolina* v. *Shewalter*, 363.
2. *Homicide. Trial. Direction of verdict.*
   In a prosecution for homicide, where accused pleaded not guilty, though he admitted the firing of the fatal shot, claiming that it was caused by his nervousness, and that he was only attempting to rob deceased, it is reversible error for the court to charge that the only question for the jury to determine was whether accused was guilty of murder in the first degree with mitigating circumstances, for Shannon's Code, sec. 6441, declares that the jury before whom an offender is tried shall ascertain whether it is murder in the first or second degree, and if accused confess his guilt, the court shall determine the degree of crime by the verdict of a jury, and the court, not having the power to set aside the verdict of a jury, cannot, as it parctically did in this case, direct a verdict of guilty or pass on any question of fact. *Shipp v. State*, 499.
3. *Criminal law. Trial. Direction of verdict.*
   In a prosecution for felony, where a plea of not guilty is interposed. the court can neither direct a verdict of guilty nor can it pass on any question of fact unfavorable to accused. *Ib.*

WATER RIGHTS.

Injunction. Right to maintain injunction.

Even though a flume company was not authorized by law to appropriate water to run its flume, a riparian owner, who stood by and without objection allowed it to erect a valuable flume, which would be worthless without the water from his stream, cannot then enjoin such appropriation of water, for the granting of an injunction is always a matter of discretion, and the court should refuse one when it will destroy valuable property of one party without any corresponding benefit to another. *Railroad* v. *Transportation Co.*, 277.

WILLS.

Libel and slander. Publication. Republication.

The probate of a will was a publication of a libel contained therein sufficient to sustain a suit even if, as claimed, there

WILLS.—Continued.

was a publication thereof during the testator's lifetime by the dictation of the will to a stenographer. *Harris* v. *Trust Co.*, 573.

WITNESSES.

1. *Taxation. Inheritance tax. Collection. Witness fees.*
In an inheritance tax proceeding, the county court had power to allow special compensation to an expert witness, who testified as to the value of real estate. *Deen* v. *Crenshaw*, 123.

2. *Appeal and error. Record. Questions presented for review. Expert witness. Fees.*
In an inheritance tax proceeding, an allowance of $30 to an expert witness on the value of real estate could not be held erroneous, where the facts upon which the trial court acted were not before the supreme court. *Ib.*

WRIT OF ERROR.

Criminal law. Appeal and error. Bill of exceptions. Evidence on motion for new trial.
Where the record in a criminal case showed that the defendant had pleaded not guilty, but testimony was introduced on the motion for a new trial that he had never been properly arraigned, the question cannot be considered on writ of error, where the bill of exceptions fails to show that it contains all the evidence offered on the motion for a new trial. *Odeneal* v. *State*, 60.